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I

Citations to Opinions Below

a. The opinion of the Supreme Court of the State of Michigan of which review is sought, printed in Appendix B hereto, *infra,* p. 2a, is officially reported sub nom *Panhandle Eastern Pipe Line Co. v. Michigan Corporation and Securities Commission,* in 346 Mich. [Advance Sheets of June 28, 1956] 50.

b. The opinion of the trial court, affirmed by the court below, is unreported and is printed in the record, p. 55.

c. The administrative decision of the Michigan Corporation Tax Appeal Board, reversed by the trial court, is unreported and is printed in the record, p. 40.[1]

II

Jurisdiction

The final judgement of the Supreme Court of the State of Michigan was pronounced on the 4th day of June, 1956. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1257 (3).

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[1] We file with this petition under provisions of paragraph 4 of Rule 21, 9 copies of the record as printed for the use of the court below.

III

Questions Presented

On the Merits:

Did the court below err in holding that the formula provided in § 5 of the Michigan statute here in question, [2] used by the Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board, petitioners herein, in computing and determining the annual corporation franchise privilege fee or tax to be paid by Panhandle Eastern Pipe Line Company, respondent herein, for the year 1952, laid an unconstitutional burden on interstate commerce conducted by Panhandle in Michigan and other States, in violation of the Commerce Clause of the Constitution of the United States, Article I, § 8 (3)?

By this Petition:

Has the Supreme Court of Michigan decided a federal question of substance and importance not heretofore determined by this Court or in a way probably not in accord with applicable decisions of this Court?

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[2]

Pub. Acts Michigan 1921, No. 85, § 5, as amended by Pub. Acts of Michigan 1952, No. 183 [Mich. Stat. Ann. 1953 Cum. Supp. § 21.208]. Sections 4 and 5e of the statute are also involved and they are with § 5 printed as Appendix "C" hereto, infra, p. 8a.

IV

Statute Involved

1. The statutory provisions involved will be found in Pub. Acts Mich. 1921, No. 85, §§ 4 and 5, as amended by Act No. 183, Pub. Acts Mich. 1952, and § 5e thereof, added by Act No. 183 aforesaid [Mich. Stat. Ann. 1953 Cum. Supp. §§ 21.205, 21.208, and 21.208 (5)]. They are printed in Appendix "C" hereto, *infra*, p. 8a.

a. Section 4, *supra*, requires each foreign and domestic corporation to pay at the time of filing its annual report with the Michigan Corporation & Securities Commission, [3] an annual fee of 4 mills upon each dollar of its paid-up capital and surplus, it being the express legislative intent that such a tax be imposed upon every corporation, foreign or domestic, "having the privilege of exercising corporate franchises within this state, irrespective of whether any such corporation chooses to exercise such privilege during any taxable period." [4] The measure of such tax is determined by formulae prescribed in § 5 of the act, supplemented, in administrative discretion, by additional formulae prescribed by § 5e, added to the act in 1952 by Pub. Act No. 183.

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[3]

These annual reports are filed pursuant to Pub. Acts 1931, No. 327, §§ 81 and 82 [Comp. Laws Mich. 1948, §§ 450.81 and 450.82].

[4]

Such tax is construed as a fee for the privilege of doing and being able to do business within the state, imposed upon intangibles of the corporation, not as a property tax, but as an excise tax in which property is merely used as a yardstick or basis of computation. Holland Ditch Co. v. State of Michigan, 318 Mich. 474; Udylite Corp. v. Corp. & Sec. Comm., 319 Mich. 1; Chicago, Duluth etc. Transit Co. v. Corp. & Sec. Comm., 319 Mich. 14.

b. Section 5 prescribes in substance that the annual franchise fee imposed in § 4, *supra*, shall be determined and measured by the corporation's paid-up capital and surplus obtained by applying the average of 3 percentages or factors, separately computed: (1) the average value of the taxpayer's real and tangible personal property within the state during the tax period, divided by the average value of all the taxpayer's real and personal property wherever situated during such period; (2) the total wages, salaries and other personal service compensation during such period, of officers and employees within the state divided by the total wages, salaries and other personal service compensation during such period of all the taxpayer's officers and employees within and without the state; and (3) the receipts of the taxpayer arising during such period from 5 specified sources, including *inter alia*: (a) total receipts from intrastate sales; (b) 50% of receipts derived from sales in Michigan of goods transported into the state; and (c) 50% of receipts from sales made out of the state of property shipped into Michigan. [5]

c. Section 5e, invoked by Panhandle, permits the commission, in its discretion to make adjustments of allocation factors to reflect activity, business, receipts and capital attributable to the State.

2. Validity of such provisions was tested in the courts below by the Commerce Clause of the Constitution of the United States, Art. I, § 8 (3) which vests in the Congress power

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[5]
It is these provisions of § 5 which Panhandle challenged on constitutional grounds and which the Michigan Supreme Court, as well as the trial court struck down because, as applied, they were deemed to conflict with the Commerce Clause of the Federal Constitution.

"to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

V

Concise Statement of the Case

The Panhandle Eastern Pipe Line Company, respondent, is a Delaware corporation admitted to do business in Michigan as a foreign corporation. The Michigan Corporation & Securities Commission and the Michigan Corporation Tax Appeal Board, petitioners herein, constitute the administrative agency and quasi-judicial board, respectively, charged with proper determination of corporate franchise privilege fees to be paid the State of Michigan pursuant to the statute involved, *supra* (Appendix "C" hereto).

Administrative Procedure:

In a letter dated August 28, 1952, addressed to the Commission (R. 11-12), Panhandle enclosed its annual report for that year (R. 10-11), together with its check for $17,561.89 to cover the privilege fee in accordance with the computation shown on such report, based on 5 factors later rejected by the Commission because not in strict compliance with § 5 of the act in question.[6]

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[6] Such factors were as follows:—(1) Average value of real property and tangible personal property in Michigan as compared to total; (2) personal service compensation paid for services rendered in Michigan; (3) receipts from sales of tangible personal property from Michigan inventories delivered in Michigan and 50% of such receipts from out-state inventories with Michigan deliveries as compared to total receipts everywhere; (4) gas purchased in Michigan as compared to total gas purchases; and (5) operating expenses in Michigan to total operating expenses.

There followed in due course, an extended correspondence between Panhandle and the Commission (R. 8-19) in which the former claimed (R. 14-15, 18, 19-26) it was legally entitled to compute its annual privilege fee in accordance with the method adopted by the legislature when adding § 5e to the statute in 1952, while on the other hand the Commission insisted (R. 8-10, 12-13, 16-17) that the taxpayer adhere strictly to the formula of § 5 of the act. As thus computed by the Commission the amount due was $24,539.59 while Panhandle's computation reached the sum of $17,561.89. The Commission finally ordered (R. 8-10) Panhandle to remit the balance of $6,977.70.

Panhandle appealed to the Michigan Corporation Tax Appeal Board (R. 1-8), attaching to its petition as exhibits, letters comprising the correspondence referred to above. A hearing before the appeal board was held on the 28th day of January, 1954 when testimony was taken (R. 28-34) and an affidavit (R. 35-39) of Panhandle's controller and assistant secretary was received in evidence as an exhibit (R. 34).

This same officer testified (R. 31-34) that Panhandle's gas pipe line originates in the Texas Panhandle field and terminates in Michigan, at Detroit, after crossing the Ohio-Michigan state line about south of Adrian, Michigan (R. 31). As this pipe line comes through the various states, sales are made therein as well as in Michigan. The gas is measured (R. 32) through a station in case Panhandle owns the lateral; in other cases it delivers right off the line to the customer. In Michigan it is measured at the so-called Detroit gate and also at Adrian.

He further testified (R. 32) that gas taken from the line near Adrian and other points in Michigan, and gas severed from the main line at Detroit, except one sale at the Canadian border, never goes outside of Michigan when it is once

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1956

No. 354

MICHIGAN CORPORATION AND SECURITIES COMMISSION AND MICHIGAN CORPORATION TAX APPEAL BOARD,

Petitioners,

v.

PANHANDLE EASTERN PIPE LINE COMPANY, a Delaware corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Thomas M. Kavanagh
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General
Counsel for Petitioners
The Capitol, Lansing 3, Mich.

BYRON, BOYD & GUNNISON, INC., BOOK MANUFACTURERS, LANSING, MICH. 1956

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1956

No.——

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Petitioners,

v.

PANHANDLE EASTERN PIPE LINE COMPANY, a Delaware corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable the Chief Justice of the
United States and Associate Justices of
the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of Michigan entered in the above entitled cause on the 4th day of June, 1956, printed in Appendix A hereto, *infra*, p. 1a.

severed and measured. There is a severance point at the Detroit gate and down near Adrian where the gas going into Michigan is cut off. Gas from Adrian and the Detroit gate, those two outlets or volumes stay right in Michigan. It is gas that Panhandle brought into Michigan and when the company delivers to Michigan, it is measured and going to stay in Michigan. Other lines go into Canada, but no gas is stored (R. 33) in Michigan by Panhandle.

Panhandle sells gas to Michigan gas companies and to Michigan Consolidated and to southeastern Michigan (R. 33), but its sales to Consumers are intrastate sales, at Howell, of gas produced in the state. Gas sold to Michigan Consolidated is delivered at the city gate measuring station.

Further, the witness claimed (R. 33) Panhandle does not store gas at all and therefore its sales to Michigan Consolidated and other companies are all interstate except the sales from the Howell (Michigan) station to Consumers Power.[7] That fact has been accepted by the Federal Power Commission which regulates Panhandle's rates, based on the cost of delivering the gas. The percentage of sales of gas made by the company in Michigan, as to total sales, is 40%; its sales to Consolidated alone, is 15% (R. 34).

Finally, this witness testified (R. 34), Panhandle owns the lateral coming off south of Adrian at the main line, viz., all the lateral extending west of the main line. He could not locate the cut-off point where the main pipe line connects onto the lateral.

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[7]

This was the first time in the administrative proceedings that Panhandle invoked the Commerce Clause of the Constitution of the United States. The claim was maintained, however, throughout subsequent litigation in Michigan's courts.

Further details said to support Panhandle's theory that its sales of natural gas in Michigan, with the exception of such product sold wholly within that state, appear in the affidavit aforesaid (R. 35-39) and need not be repeated here.

The Court's attention, however, is respectfully invited to Panhandle's system map inserted in the back of the record printed for use of the Michigan Supreme Court, from which it may be noted that while Panhandle's pipe lines originate in Texas and terminate in Michigan, many lateral lines run wholly intrastate, severed from the main pipe lines coming up from Texas; that one lateral cut-off from the main pipe line goes directly to Adrian (R. 32), and that another lateral cut-off goes northeast with cut-offs therefrom to Blissfield, Tecumseh, Clinton, Kalamazoo, Battle Creek, Marshall, Albion, Jackson, Howell and Clawson, with a line extending up and connecting with the Consumer's Power Company line that empties into the Consumer's Power storage facilities at Winterfield Township, Clare county, Michigan.

The tax appeal board, for reasons set forth in its opinion (R. 40-45) of Feb. 19, 1954, held (R. 45) that computation of the 1952 corporation privilege fee by the commission was correct and that there was due to the State of Michigan by Panhandle the amount of $6,977.70.

Trial Court Proceedings:

Thereafter, Panhandle paid such amount under protest and on the 9th day of March, 1954, pursuant to statute,[8]

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[8] Pub. Acts Michigan 1952, No. 197, as amended [Mich. Stat. Ann. and 1953 Cum. Supp., and 1955 Cum. Supp. § 3.560 21.1 et seq.]

filed its petition (R. 46) in the circuit court for the county of Ingham, praying review and reversal of the administrative determinations, findings and opinions aforesaid.

In paragraph 5 of its petition (R. 48-49), subdivision 4, (a), (b), (c) and (d), Panhandle distinctly raised the federal question here presented by alleging in substance and effect that the determination of petitioners herein was in violation of its rights under the Commerce Clause of the Constitution of the United States, Article I, § 8, for the following express reasons:

> "(a) Said determination imposes a direct burden on interstate commerce.
>
> (b) Said determination imposes an unreasonable burden on interstate commerce.
>
> (c) Said determination imposes a direct tax on the privilege of carrying on interstate commerce.
>
> (d) Said determination is based on Section 5 of Act 85 of the Public Acts of 1921 as amended, and said Section 5 in defining the scheme or formula to be used in determining what portion of the paid in capital and surplus of a corporation engaged in interstate commerce is to be used as the basis for its annual privilege fee, fails to make provision for a legal and constitutional method of allocating the portion of the receipts of such corporation from interstate commerce which is to be used for such annual privilege fee."

On the 13th day of September, 1955 the trial court handed down its opinion (R. 55) and on the 14th day of October, 1955 entered an order (R. 59) remanding the matter to the administrative agency with a mandate to recompute the

privilege tax pursuant to § 5e of the statute in question, and to exclude from such computation "any and all receipts of petitioner (Panhandle) derived from the interstate sale in the state of Michigan of natural gas transported by it in interstate commerce through its pipe lines from points outside of the state of Michigan" (R. 60).

Michigan Supreme Court Proceedings:

The administrative agencies (petitioners here) took a timely appeal (R. 61-62) to the Michigan Supreme Court, saving for review and stressing the federal question presently involved, and the cause was submitted on the 5th day of April, 1956.

On the 4th day of June, 1956 the court below affirmed the order of the trial court when it handed down its opinion (Appendix "B" hereto) officially published in 346 Mich. 50, in which it was pointed out, *inter alia*, that "the principal question here for decision is whether the action of the commission and the appeal board violated plaintiff's privilege of carrying on interstate commerce," *idem.*, p. 55. In the opinion of the court it was "clear that the formula used by the commission includes receipts from a business not related to . . . [Panhandle's] intrastate business, and under the authority of the *Gartland Case*, *supra*,[9] it is arbitrary and imposes an unjust burden upon interstate commerce." Finally, the court held that the petitioners herein erred in determining that section 5 of the statute here involved, was applicable in determining the annual privilege fee of Panhandle for the year 1952, rather than and without adjustment pursuant to section 5e of said act, *idem.*, pp. 56-57. This petition for certiorari follows.

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[9]
Gartland Steamship Co. v. Corporation & Securities Commission, 339 Mich. 661.

VI

Reasons for granting the Writ

It is our position: (1) that both in the trial court and in the highest court of the State there was drawn in question the validity of § 5 of the statute involved, on the ground that as applied to Panhandle it was repugnant to the Commerce Clause, and that each state court so held [28 U.S.C. § 1257 (3)]; thus the Michigan Supreme Court has decided a federal question of substance within Rule 19 (a); (2) that the precise question presented has not been determined by this Court and, if any of its decisions bear thereon, the court below has decided it in a way probably not in accord therewith; and (3) that quite apart from the direct interests of the respective parties, and despite the small amount of money involved, it is of vital importance to other litigants and parties, to the taxpayers of the State of Michigan and those of other States, as well as to Michigan's system of taxation as a whole, that the question presented be decided finally by this Court.[10]

1. Unlike the situation in *Black v. Cutter Laboratories*, 351 U.S. 292, this Court is requested to review a final judgment rather than a mere statement found in the opinion of the court below, 346 Mich. 50.

a. Although not pressed before the administrative agencies (petitioners here), Panhandle did invoke the Commerce Clause and did draw in question the validity of § 5 of the statute, as tested by such Clause, in its petition for review filed in the Michigan trial court of original jurisdiction, and

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[10]
We are laying aside much that might be said of the merits to the case in order to stress the importance of a review by this Court.

it raised this distinctly federal question in precise and unmistakable terms.[11]

b. The trial court expressed the opinion (R. 58) in no uncertain or ambiguous language, that in using the formula of § 5 of the statute, the State agencies placed a tax on interstate business done by Panhandle, and that they could not so increase the amount of the privilege tax involved. The judgment of the trial court (R. 60) followed the opinion by ordering your petitioners to exclude from their computation of the tax "any and all receipts" of Panhandle "derived from the interstate sale in the state of Michigan of natural gas transported by it in interstate commerce through its pipe lines from points outside of the State of Michigan." Thus, the effect of the trial court's judgment was to hold that § 5, as applied, violated the Commerce Clause. And § 5 thereby became as legally dead as though more expressly pronounced invalid under the Federal Constitution.

c. The opinion and final judgment of the State's highest court, 346 Mich. 50, was just as explicit in considering and deciding the federal question involving the validity of § 5 of the statute. Each of the 5 headnotes of the opinion as officially reported,[12] states a legal and constitutional principle based on the Commerce Clause, and the court itself, *idem.*, p. 55, posed the principal question for decision to be "whether the action of the commission and the appeal board violated plaintiff's (Panhandle's) privilege of carry-

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[11]

Nothing could be more explicit than the language employed by counsel for Panhandle in subdivision 4 of paragraph 5 of such petition (R. 48-49)

[12]

Such headnotes are prepared by the court's reporter under supervision of the writer of the opinion.

ing on interstate commerce." And it answered the question by declaring that use of the formula set up in § 5 of the statute and used in this case, "imposes an unjust burden upon interstate commerce." The result, we respectfully submit, was to invalidate § 5 perforce the Commerce Clause. If this be true, it follows that the Supreme Court of Michigan has decided a federal question of substance.

2. So far as the merits of our contention are concerned, it is petitioners' position that the State is not prohibited by the Commerce Clause from including receipts or property derived from or used in interstate commerce in the factors used to measure a corporate privilege fee of a foreign corporation doing an intrastate business within the state. In other words, in applying the receipts allocation factor of § 5, the State is validly measuring, in conjunction with the property and compensation factors, the reasonable value of the privilege granted Panhandle, permission to do and doing intrastate business within the State. Multistate business should, in our view, be required to pay their just portion of state tax burdens, and at the same time not be subjected to multiple burdens of taxation, as compared to intrastate businesses.[13]

The issue is debatable and, as we read them, recent decisions upon which Panhandle will rely, fall somewhat short of laying the precise question at complete rest:

> *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602, struck down a state tax imposed upon the franchise of a foreign corporation for the privilege of doing business within the State of Connecticut when

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[13]

To demonstrate this proposition would require an adequate and comprehensive brief, reviewing the decisions of this Court, wholly inappropriate, however, for present purposes.

the business consisted *solely* of interstate commerce, but the Court recognized the principle, here asserted;[14]

Norton Co. v. Department of Revenue, 340 U.S. 534, sustained in principle and in part the Retailers Occupation Tax Act of Illinois;

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, held invalid under the Commerce Clause, a Texas tax on the occupation of "gathering gas," measured by the entire volume of gas "taken," as applied to an interstate natural gas pipeline company, but there the so-called privilege of "gathering gas" was not a separable one; the "taking" into appellants' pipeline was solely for interstate transmission and the gas at that time was actually moving in interstate commerce; and

Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, declared invalid a gross-receipts privilege tax as applied to a foreign corporation doing an *exclusive* interstate business.

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[14]

The Court stated, 340 U.S. 609, that its conclusion was "not in conflict with the principle that where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate."

Also, we respectfully submit, the court below decided the case probably not in accord with the following decisions of this Court:[15]

Baltic Mining Co. v. Massachusetts, 231 U.S. 68;

Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113;

Hump Hairpin Co. v. Emmerson, 258 U.S. 290;

International Shoe Co. v. Shartel, 279 U.S. 429;

Western Cartridge Co. v. Emmerson, 281 U.S. 511;

East Ohio Gas Co. v. Tax Comm. of Ohio, 283 U.S. 465;

Matson Navigation Co. v. State Board, 297 U.S. 441;

Western Live Stock v. Bureau, 303 U.S. 250;

Ford Motor Co. v. Beauchamp, 308 U.S. 331;

Dept. of Treasury, Ind. v. Wood Preserving Corp., 313 U.S. 62;

Butler Bros. v. McColgan, 315 U.S. 501;

International Harvester Co. v. Evatt, 329 U.S. 416.

Moreover, the opinion of the Michigan Supreme Court conflicts with principles announced in a decision of this Court involving a Michigan statute as applied to the regulation of Panhandle's sale and distribution of gas to local consumers in Michigan, deemed by this Court to be essen-

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[15]

While we make no extravagant claims for these cases, and although it cannot be said with positive certainty that singly or in the aggregate they absolutely control, they do, we think, sustain our position in principle.

tially local in aspect, although involving interstate transportation.

Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U.S. 329.

3. Obviously, of course, Michigan would not in ordinary circumstances seek certiorari to review a final judgment of her own Supreme Court merely for the purpose of retaining the comparatively trivial sum of tax avails tied up in this particular suit. The petitioners do pray such relief, however, because of the constitutional principles involved and the impact of the decision at bar upon the State's tax structure, and for other important reasons.

a. Michigan in the depression years abolished general property taxation and substituted therefor a general retail sales tax act,[16] which, however, proved insufficient to meet the rising cost of State government. It was for this reason, among others, that the legislature retained and expanded the statute here in question, including the formula set up in § 5 of that act. And it was also for this reason that Michigan enacted similar measures, including a business activities tax.[17]

An examination of records of the Michigan Department of Revenue (which includes petitioners) has been made at our request to determine the amount of corporate franchise fees which under the decision of the court below would

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[16]

Michigan Stat. Ann., 1950 Revised, and 1955 Cum. Supp. § 7.521 et seq., Use Tax, § 7.555(1) et seq.

[17]

Act 150, Public Acts, 1953, as amended by Act 17, Public Acts 1954, and Act 282, Public Acts 1955; Mich. Sta.. Ann., Sec. 7.557(1), 7.557(24) 1955 Cum. Supp., Secs. 205.551-205.574 Comp. Laws. 1948.

be refundable for the privilege years 1953 to 1956, and we are informed by competent and reliable authority that such examination discloses an aggregate $25 million loss by excluding "interstate receipts" from the sales factor of the § 5 formula.

b. If, as we are informed and believe, the doctrine evolved by the Michigan Supreme Court in affirming the order of the trial court,[18] is equally applicable to Michigan's business activities tax (note 17), the State may be required to repay to taxpayers an amount representing the tax paid by them, measured in part by a statutory percentage of receipts other than from sales from Michigan inventories to Michigan destinations. Such amount so refundable is estimated by competent experts of Michigan's Department of Revenue at $30 million.[19]

It might be reasonably stated, we think, that the decision of the court below is of the utmost importance to the fiscal and tax problems of the State. First, Michigan faces a potential refund obligation reasonably estimated at $50 million, plus anticipated loss of current revenues in an amount approximating $20 million annually.[20] Second, such revenue loss must be shifted to those businesses having substantial payrolls and properties in Michigan, or to the general taxpayer through legislation.

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[18]

The order of the trial court (R. 60) would compel the Commission to exclude from computation of the privilege fee, all receipts derived from interstate sales in Michigan.

[19]

The future economic loss to the State from this source of revenue is inestimable; one reliable estimate places this loss at 45-50% of current business activities tax collections.

[20]

These figures are supplied by the Michigan Department of Revenue.

c. If, as we claim, the court below has erroneously interpreted and applied decisions of this Court, it follows that the taxing power of the State of Michigan, as compared to the taxing power of other States, is unconstitutionally restricted.

Numerous States of the Union have adopted what is known as the Massachusetts formula, or the formula set up in § 5 of the Michigan statute, or some other method closely akin thereto, and the decision below in this cause might tend to weaken such tax structures, if it is allowed to go unchallenged in this Court.

Appendix "D" hereto, *infra*, p. 14a, is a schedule of statutes of other States having corporate franchises based primarily on capital stock value, which employ apportionment formulas to allocate the capital stock value of corporations doing business in other states in addition to the taxing state. This appendix provides a brief description of the allocation factors used by the several States, the manner in which these factors are combined, and the tax base to which the allocation fraction is applied.

Thus it clearly appears, or so it seems to us, that it is vitally important to the State of Michigan, as well as to the country at large, that this Court issue its writ of certiorari in order that the decision of the Michigan Supreme Court may be reviewed and that the questions presented set at rest.

This Court, it should be noted, has on occasion reviewed and reversed final judgments of State courts, which, in

similar circumstances, invalidated state taxing laws as being repugnant to the Commerce Clause when in fact they were not repugnant.[21]

VII

Conclusion

Therefore petitioners respectfully request that a writ of certiorari issue to the Supreme Court of Michigan.

Thomas M. Kavanagh
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General
Counsel for Petitioners
P. O. Address: The Capitol, Lansing 2, Mich.

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[21]

McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33; McGoldrick v. Compagnie General Transatlantique, 309 U.S. 430; Nelson v. Sears, Roebuck & Co., 312 U.S. 359; and Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 75.

Appendix "A"

Judgment of the Court Below

(Entered, June 4, 1956)

[Entitled in Court and Cause]

"AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 4th day of June in the year of our Lord one thousand nine hundred and fifty-six.

Present the Honorable

John R. Dethmers,
Chief Justice,

Edward M. Sharpe,
Talbot Smith,
Niel E. Reid,
Emerson R. Boyles,
Harry F. Kelly,
Leland W. Carr,
Eugene F. Black,
Associate Justices.

"The records and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Ingham, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said

Circuit Court, there is NO ERROR, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Ingham be and the same is hereby in all things affirmed, and that the plaintiff do recover of the defendants its costs, to be taxed, and that it have execution therefor."

Appendix "B"

Opinion of the Court Below

(Filed, June 4, 1956)

BEFORE THE ENTIRE BENCH.

SHARPE, J.

This is an appeal by the Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board from an order of the circuit court of Ingham county, Michigan, remanding the cause to the Michigan Corporation and Securities Commission to recompute the annual franchise tax pursuant to § 5e of PA 1952, No. 183, being Mason's 1954 Supp § 450.305e [Stat Ann 1955 Cum Supp § 21.208(5)]. Plaintiff, Panhandle Eastern Pipe Line Company, is a Delaware corporation and is engaged in the distribution of natural gas. Most of the gas distributed comes from Texas and other southern states, however a small portion of the natural gas distributed is produced in Michigan. Defendants, Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board, constitute the administrative agency and quasi-judicial board concerned with the proper determination of corporate franchise privilege fees to be paid the State of Michigan pursuant to PA 1921, No. 85, as amended by PA

1952, No. 183 (CL 1948 and Mason's 1954 Supp § 450.301 et seq. [Stat Ann and Stat Ann 1955 Cum Supp § 21.201 et seq.)].

The following statistics of plaintiff's activities for the calendar year of 1951 are material to the solution of the issue presented in this cause: Plaintiff owned and operated in the year in question 3,974.55 miles of pipe line, of which 281.16 miles, or 7.0740%, were located in Michigan. Out of all the miles of pipe line in Michigan, only 11.4 miles, or 4.07%, were used both for gas produced in Michigan and gas produced elsewhere and transported into Michigan. The remaining 269.76 miles of pipe line in this State were used exclusively for the interstate transportation and sale of gas produced in and transported through other states. 5.0304% of plaintiff's property was located in Michigan in the year in question. Of plaintiff's total payroll, 3.3512% is paid in Michigan and 2.0360% of its total operating expenses were incurred in Michigan. For gas produced and sold in Michigan, plaintiff received 2.1688% of its total receipts everywhere. 94.0718% of its receipts from sales in Michigan were for gas produced elsewhere and transported in interstate commerce through a pipe line crossing seven other states. The latter sales accounted for 34.4161% of plaintiff's total receipts from all sources, including Michigan.

On August 28, 1952, plaintiff transmitted to defendant commission its annual report for 1952 with a franchise fee for the year 1952 in the amount of $17,561.89, based upon § 5e of PA 1952, No. 183 (Mason's 1954 Supp § 450.305e [Stat Ann 1955 Cum Supp § 21.208(5)]). The commission held that plaintiff was not entitled to relief under the provisions of § 5e, but should use § 5 of PA 1921, No. 85, as amended by PA 1952, No. 183 (CL 1948 and Mason's 1954 Supp § 450.305 [Stat Ann and Stat Ann 1955 Cum Supp

§ 21.208]). Upon appeal the Michigan Corporation Tax Appeal Board affirmed the ruling of the commission.

Pursuant to PA 1952, No. 197, as amended by PA 1953, No. 103 (CL 1948 and Mason's 1954 Supp § 24.101 et seq [Stat Ann Rev and Stat Ann 1955 Cum Supp § 3.560(21.1) et seq]), plaintiff filed a petition for review in the circuit court for Ingham county based upon the claim that the action of the appeal board imposed a direct burden on interstate commerce.

On October 14, 1955, an order was entered which, in part, reads as follows:

"ORDER and ADJUDGE that the matter of the computation of the annual franchise tax of petitioner for the year 1952 be remanded to the Michigan Corporation and Securities Commission, and that said tax be recomputed by said Commission pursuant to Section 450.305(e) of the Compiled Laws of 1948 as added by Act 183 of the Public Acts of 1952, and that said Commission exclude from such computation any and all receipts of petitioner derived from the interstate sale in the State of Michigan of natural gas transported by it in interstate commerce through its pipe lines from points outside of the State of Michigan."

Prior to the entry of the above order the trial court filed an opinion, in part, as follows:

"In the instant case this Court is of the opinion that in using the formula set forth in Sec. 5 the defendant is placing a tax on plaintiff based upon the interstate business done by plaintiff. Panhandle does an intrastate as well as an interstate business and the defendant could very readily base the tax upon the intrastate business done by Panhandle. They cannot use the interstate business of plaintiff

to increase the amount of this tax. The record also indicates that the Plaintiff could discontinue their intrastate business without withdrawing from the interstate business.

"In the case of *D. & C. Navigation Company* v. *Department of Revenue*, 342 Mich 234 on page 243, the Court speaking of the Gartland case (Gartland SS. Co. v. Corp. Comm., 339 Mich 661) stated:

" 'While we reversed and ordered a recomputation, we upheld the liability of the company for the tax, if based on a formula reasonably apportioning business done within the State.'

"Therefore, this Court is of the opinion that the defendant was in error in computing the tax on plaintiff based upon its interstate business and an order may enter directing the Commission to recompute the tax of plaintiff excluding from such computation any and all receipts derived from the interstate transportation and sale of gas outside the state of Michigan."

Defendants appeal and urge:

"That the court erred as a matter of law in determining that it is unreasonable for the defendants-appellants to compute the plaintiff-appellee's corporate franchise fee for the year 1952 in accordance with the apportionment formula contained in the aforesaid section 5 of PA 1952, No. 183.

"That the court erred as a matter of law in determining in its opinion that the defendants-appellants could not constitutionally include in the measure of the plaintiff-appellee's corporate franchise fee for the year 1952 one-half of the gross receipts derived by plaintiff-appellee from its sales of natural gas from sources without this state to

customers located within this state in the sales factor of the apportionment formula contained in the aforesaid section 5 of PA 1952, No. 183."

The principal question here for decision is whether the action of the commission and the appeal board violated plaintiff's privilege of carrying on interstate commerce. Citation of authority is unnecessary to establish the rule that our Federal Constitution gives to Congress the sole right and power to regulate interstate commerce, and the States are prohibited from doing that which would substantially or unreasonably burden or obstruct the free flow of such commerce. In the case at bar the trial court found as a fact that 94.0718% of plaintiff's sales of gas in Michigan were sales in interstate commerce through interstate pipe lines.

In *Cooney v. Mountain States T. & T. Co.*, 294 US 384 (55 S Ct 477, 79 L ed 934) cited with approval in Gartland SS. Co. v. Corp. Comm., 339 Mich 661, 671, it was said:

" 'There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. * * * Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate

business without also withdrawing from the interstate business.' ''

We also cited with approval in the *Gartland* case, *supra*, *Ratterman v. Western Union Telegraph Co.*, 127 US 411 (8 S Ct 1127, 32 L ed 229), where the court said:

'' 'Where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the State to collect that arising upon commerce solely within its own territory.' ''

In the case at bar the major part of plaintiff's business is interstate business, completely severable and unrelated to its intrastate business. The record shows that 7.0740% of plaintiff's pipe line mileage is in Michigan; 5.0304% of its property is in Michigan; 3.3512% of its payroll is in Michigan; 2.0360% of its operating expenses are incurred in Michigan; 2.1688% of its receipts are from intrastate sales in Michigan and 5.9282% of its receipts in Michigan are from intrastate sales. It also appears that the commission and the appeal board in determining the tax to be paid included 50% of plaintiff's interstate receipts in the formula provided under § 5 of PA 1952, No. 183. In our opinion it is clear that the formula used by the commission includes receipts from a business not related to plaintiff's intrastate business, and under the authority of the *Gartland* case, *supra*, it is arbitrary and imposes an unjust burden upon interstate commerce. We hold that the Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board erred in determining that § 5 of PA 1921, No. 85, as amended by PA 1952, No. 183, was applicable in determining the annual privilege fee of

petitioner for the year 1952, rather than and without adjustment pursuant to § 5e of said act.

The judgment of the circuit court is affirmed, with costs.

Appendix "C"

Statute and Constitutional Provisions

1. Pub. Acts of Michigan 1921, No. 85, § 4, 5 and 5e. Title as amended by Pub. Acts Mich. 1952, No. 183:

> AN ACT prescribing the fees, taxes and charges to be paid to the state by corporations; prescribing the method and basis of computing such fees, taxes and charges; requiring certain annual reports to be filed by corporations; providing for the disposition of the moneys received under this act and prescribing penalties for non-compliance with the provisions thereof.

§ 4, as amended by Pub. Acts Mich. 1952, No. 183 [Mich. Stat. Ann., 1953 Cum. Supp. § 21.205]:

> "Sec. 4. Every cooperative association and every profit corporation organized or doing business under the laws of this state, or having the privilege to do business, employing capital or persons, owning or managing property or maintaining an office, or engaging in any transaction, in this state, excepting domestic and foreign insurance companies, medical care corporations, hospital service corporations, state and national banking corporations, trust companies, and such corporations now in existence or hereinafter incorporated formed with the consent of the banking commissioner

for the state of Michigan for the purpose of taking over all or a part of the assets of closed banks or trust companies with the intent and purpose of liquidating such assets when and as conditions warrant such action by said corporation, shall pay, at the time of filing the annual report with the Michigan corporation and securities commission, as required by sections 81 and 82 of Act No. 327 of the Public Acts of 1931, being sections 450.81 and 450.82 of the Compiled Laws of 1948, an annual fee of 4 mills upon each dollar of its paid-up capital and surplus, but such franchise fee shall in no case be less than $10.00: Provided, That operating railroad, interurban railroad, telephone, telegraph and express companies heretofore exempt from this franchise tax shall be exempt as to the franchise tax payable in 1953 and thereafter unless the state board of assessors has certified prior thereto to the Michigan corporation and securities commission that the specific tax rate under Act No. 282 of the Public Acts of 1905, as amended, being sections 207.1 to 207.21, inclusive, of the Compiled Laws of 1948, has been based upon state equalized valuation. It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period. The Michigan corporation and securities commission shall in all such cases be authorized to require the corporation to furnish detailed and exact information touching such several matters before making a final determination of the privilege fee to be paid by such corporation. For the purpose of this act only, each share of no par value shall be deemed to have the value of at least $1.00, or such value as shall have been fixed by the corporation for the sale of such stock, or

the book value as determined by the Michigan corporation and securities commission, whichever may be the higher. In any case where the capital of a corporation is not divided into shares, the whole property thereof shall be deemed to be the authorized capital stock for the purposes of this act.

"The term 'surplus', as used in this act, shall be taken and deemed to mean the net value of the corporation's property, less its outstanding indebtedness and paid-up capital; but in no case, either as to domestic or as to foreign corporations, shall any deduction be made from the item of paid-up capital, in computing the franchise fee thereon, by reason of any impairment of the same."

§ 5, as amended by Pub. Acts Mich. 1952, No. 183 [Mich. Stat. Ann., 1953 Cum. Supp., § 21.208]:

"Sec. 5. In the case of computing the annual franchise fee prescribed by section 4 of this act, both as to domestic and foreign corporations, such computation shall be made by the Michigan corporation and securities commission, working in conjunction with the state department of revenue, upon the entire paid-up capital and surplus of any corporation which does not maintain a regular place of business outside this state other than a statutory office. With respect to any other corporation, except for corporations engaged in business as carriers by air, railroad, highway or water, or finance-business, which are separately treated in sections 5a, 5b, 5c and 5d of this act, said annual franchise fee shall be determined by the Michigan corporation and securities commission, working in conjunction with the state department of revenue, and shall be measured by that proportion of its paid-up capital

and surplus which proportion shall be obtained by applying the average of the following 3 percentages, separately computed:

(1) The average value of the taxpayer's real and tangible personal property within the state during the period covered by its report, divided by the average value of all the taxpayer's real and tangible personal property wherever situated during such period: Provided, That such property value, both within Michigan and everywhere, shall include a sum equal to 8 times the gross rents paid or accrued per annum by the taxpayer during the period covered by the taxpayer's report for the use of real property: Provided, however, That the value of buildings erected on leased land by or on behalf of the lessee, shall be included in the taxpayer's real property both within Michigan and everywhere in the same manner as if owned by the taxpayer. 'Gross rents' shall include the entire amount of money or other consideration includable as an expense deduction in the taxpayer's annual statement of profit and loss for the period ending on the date of the taxpayer's report, either directly or indirectly, or for its benefit for the use or possession of real property irrespective of whether such rent be stated as a fixed sum of money, a percentage of sales, profits or otherwise, and shall include any amount paid or accrued as interest, taxes, insurance or any other item of expense to the taxpayer pursuant to its use of real property belonging to another, but shall not include depreciation or amortization on buildings erected on leased land by the taxpayer or amounts separately billed for utility service, whether billed by the lessor or another.

(2) The total wages, salaries and other personal

service compensation during such period, computed on the cash or accrual basis according to the method used for federal tax purposes, of officers and employees within the state divided by the total wages, salaries and other personal service compensation, similarly computed, during such period of all the taxpayer's officers and employees within and without the state.

(3) The receipts of the taxpayer, similarly computed, arising during such period from:

(a) Sales of its tangible personal property located within this state at the time of the receipt of or appropriation to the orders where shipments are made to points within this state;

(b) Sales of tangible personal property located within this state at the time of the receipt of or appropriation to the orders where shipment is made to points outside of the state and sales of tangible personal property located without the state at the time of receipt of or appropriation to the orders where shipment is made to points within the state, but only to the extent of 50 per centum of the receipts from the sales referred to in this subdivision (b); and

(c) Sales of any such property not located at the time of the receipt of or appropriation to the orders at any permanent or continuous place of business maintained by the taxpayer without the state, where the orders were received or accepted within the state, but only to the extent of 50 per centum of the receipts from the sales referred to in this subdivision (c). For the purpose of this subdivision (c), an order shall be deemed received or accepted within the state if it has been received or accepted by an employee, agent,

agency or independent contractor chiefly situated at, connected with, by contract or otherwise, or sent out from a permanent or continuous place of business of the taxpayer within the state;

(d) Services performed within the state;

(e) Rentals from property situated, and royalties from the use of patents or copyrights, within the state; divided by the total amount of the corporation's receipts, similarly computed, arising during such period from all sales of its tangible personal property, services performed, and rentals and royalties, within and without the state."

§ 5e, added by Pub. Acts Mich. 1952, No. 183 [Mich. Stat. Ann., 1953 Cum. Supp. § 21.208(5)]:

"Sec. 5e. If it shall appear on the application of the taxpayer or otherwise that an allocation factor determined pursuant to this act does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state, the commission shall adjust it by:

(1) Excluding 1 or more of the factors or any component thereof;

(2) Including 1 or more other factors, such as expenses, purchases, contract values (minus sub-contract values);

(3) Excluding proportionately 1 or more asset items in computing entire paid-up capital and surplus; or

(4) Apply any other similar method calculated to

effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to this state.

"The commission shall promptly publish its rulings with respect to any application of the provisions of this section. Such rulings shall be promulgated in conjunction with the state department of revenue.

"This act is ordered to take immediate effect.

"Approved April 29, 1952."

2. U. S. Const., Art I, § 8(3).

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

U. S. Const., Art. XIV, § 1.

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

Appendix "D"

Schedule of Statutes of other States which have corporate franchise taxes based primarily on capital stock value.

ARKANSAS

Basis: value of corporation's outstanding capital stock.

Allocation factors: Property—value of property in state divided by value of property everywhere.

Applies to domestic and foreign corporations.

Statutory Reference: Act 304, Laws 1953, Sec. 84-1801.2.

COLORADO

Basis: for domestic corporations — authorized capital stock.
for foreign corporations — capitalization — issued and outstanding capital stock.

Allocation factors: Property—the proportion of the corporation's capital, property and assets in Colorado.

Applies only to foreign corporations.

Statutory reference: Colo. Revised Statutes, Chap. 138, Article 2, Sec. 138-2-2.

FLORIDA

Basis: shares of stock outstanding.

Allocation factors: Either of two methods used, depending on the facts and circumstances in each case.

a. Property—ratio of assets in Florida to total assets.

b. Business—ratio of business in Florida to total business. This is used apparently where corporations manufacture and sell products in the state but have little investment in assets in the state.

Applies directly to foreign corporations. Attorney general

ruled in 1931 that domestic corporations should be allowed the same rules of allocation as are applied to foreign corporations. (Whether or not this ruling is still operative has not been determined.)

Statutory reference: Florida Statutes, Sec. 608.33.

GEORGIA

Basis: net worth — issued capital stock and paid-in and earned surplus.

Allocation factors: Property and Business—ratio that value of property and assets plus volume of business in Georgia bears to total everywhere.

Applies only to foreign corporations.

Statutory reference: Georgia Code of 1933, as amended, Title 92, Chapter 92-3. Sec. 92-307.

ILLINOIS

Basis: The sum of the corporation's state capital and paid-in surplus.

Allocation factors: Property and Business—ratio that value of property located in the state plus the gross amount of business transacted in the state bears to the total everywhere.

Applies to both domestic and foreign corporations.

Statutory reference: Sec. 139 of the Business Corporation Act, Act of July 13, 1933.

KANSAS

Basis: domestic—paid-up capital stock.
foreign—issued capital stock.

Allocation factors: Property and Business — reporting form requires the listing of amounts of property and business in and out of Kansas.

Applies to foreign corporations only.

Statutory reference: General Statutes, Chap. 17, Act 2, Sec. 17-702.

KENTUCKY

Basis: Value of capital stock. (monthly average of highs and lows for taxable year).

Allocation factors: Property and Business (including payrolls) combined as follows:

Business factors — gross sales, purchases, and payrolls—in Kentucky are summed and divided by two. This amount is added to property in Kentucky. This total is divided by the business factors (gross sales, purchases, and payrolls) everywhere divided by two, plus property everywhere.

Applies to both domestic and foreign.

Statutory reference: Kentucky Revised Statutes, XI, Chap. 136, Sec. 136.070.

LOUISIANA

Basis: Amount of corporation's issued and outstanding capital stock, surplus, undivided profits and borrowed capital of over 1 year maturity.

Allocation factors: Property and Business—Ratio of net sales made in the regular course of business and other revenues in Louisiana to total everywhere, averaged with ratio of property and assets in Louisiana to total everywhere.

Applies to both domestic and foreign.

Statutory reference: Revised Statutes of Louisiana of 1950, as amended, Title 47, Subtitle II, Chap. 5, Sec. 606.

MICHIGAN

Basis: Amount of paid-up capital and surplus.

Allocation factors: Property, Payrolls and Receipts—average of the three percentages computed separately:

a. Average of real and personal (tangible) property in state divided by total everywhere. Property rented and leased included in totals.

b. Payroll within the state divided by total everywhere.

c. Michigan receipts divided by total everywhere.

Applies to both domestic and foreign.

Statutory reference: Mason's 1954 Supplement to Michigan Compiled Laws of 1948, Sec. 450.305.

MISSISSIPPI

Basis: Value of capital stock, surplus and undivided profits.

Allocation factors: Property and Gross Receipts—real estate and tangible personal property in the state is added to gross receipts from business carried on in the state; this amount is divided by sum of the two everywhere. If this percentage applied to the basis exceeds the assessed value of real and tangible personal property in the state then the former amount is used; if the assessed value of property is greater then assessed value is used.

Applies to both domestic and foreign.

Statutory reference: Mississippi Code of 1942, Title 37, Chap. 2, Sec. 9319.

MISSOURI

Basis: Outstanding shares and surplus employed in Missouri. Surplus is defined as the gross value of assets above the par value of capital stock.

Allocation Factors: Property—ratio of property and assets in Missouri to all assets. If total capital stock exceeds

total assets then the franchise tax basis is allocated in this manner; however, if total assets exceed total capital stock then the franchise tax is based on assets within the state.

Applies to domestic and foreign.

Statutory reference: Revised Statutes of Missouri, Chap. 147, Sec. 147.010

NEW JERSEY

Basis: net worth, which includes issued and outstanding capital stock, paid-in or capital surplus, earned surplus and undivided profits, other reserves which are not for depreciation, etc., and indebtedness owing to holders of 10% or more of shares of stock.

Allocation factors: Property or Business (property, receipts and payrolls), whichever is greater. Business factor is average of three percentages (property in state divided by all property, etc.); property factor is the ratio of assets in New Jersey to total assets.

Applies to both domestic and foreign.

Statutory reference: Revised Statutes of New Jersey, 1937, as amended, Title 54, Chap. 10A, Sec. 54:10A-6.

NEW MEXICO

Basis: par value of corporation's authorized and issued capital stock.

Allocation factors: Property and Business (receipts)—property in New Mexico not used exclusively in interstate business plus intrastate receipts divided by the sum of total property and receipts.

Applies to domestic and foreign.

Statutory reference: New Mexico Statutes, 1953, Chap. 51, Article 13, Sec. 51-13-2.

NORTH CAROLINA

Basis: issued and outstanding capital stock, surplus and undivided profits.

Allocation factors: Three allocation formulas depending on character of business:

1. Manufacturing—Property and Cost of manufacturing: the ratio of the value of real estate and tangible personal property in the state to property everywhere is averaged with the ratio of cost of manufacturing in the state to cost of manufacturing everywhere.

2. Selling—Property and Sales (including rentals): the ratio of the value of property in the state to value of property everywhere is averaged with the ratio of total sales in the state to total sales everywhere.

3. Other types of businesses—The ratio of gross receipts in the state to gross receipts everywhere.

If the corporation presents evidence on appeal to the Tax

Review Board that the allocation factors used allot excessive value to the state the Board can:

a. Add to or substitute for one of the factors used the ratio of payrolls in the state to payrolls everywhere.

b. Use the corporation's detailed accounting allocation of receipts and expenditures as the basis of the taxpayer's return in lieu of the applicable allocation formula.

c. Use any other allocation formula which gives the proper results.

However, the presumption is that the prescribed formulas give the proper results until the contrary is established. If the formula is altered the new formula is the one applicable for future use.

Applies to domestic and foreign corporations.

Statutory reference: General Statutes of North Carolina as amended, Chap. 105, Article 3, Sec. 105-122(3).

OHIO

Basis: value of issued and outstanding shares of stock. This is the total value of capital, surplus, undivided profits and reserves (except reserves for depreciation, etc., and for taxes) and less good will asset value.

Allocation factors: Property and Business. The share value is divided into two equal parts, half allocated on the basis of property owned or used in the state to property everywhere, and half allocated on basis of business done in Ohio to business everywhere.

Applies to both domestic and foreign corporations.

Statutory reference: Revised Code of Ohio, as amended, Chap. 5733, Sec. 5733.05.

OKLAHOMA

Basis: Capital used in the state. Includes outstanding capital stock, surplus and undivided profits, and debt of more than 3 year maturity.

Allocation factors: Property and Business. Statute reads proportion of property owned, or property owned and business done, in state to total everywhere. However, reporting form indicates that the sum of property in state and business done in state divided by the sum of the two everywhere is the allocation percentage used.

Applies to both domestic and foreign corporations.

Statutory reference: Oklahoma Statutes, 1951, Title 68, Chap. 17, Sec. 644.10.

PENNSYLVANIA

Basis: Value of capital stock; the actual cash value at end of year, taking into consideration average selling price during year, value indicated by earnings, and value indicated by property and assets.

Allocation factors: Property, Payroll and Gross Receipts. Value of capital stock is divided into three equal parts, with one factor applied to each part.

1. Property—ratio of tangible property in state to tangible property everywhere.

2. Payroll—ratio of payroll in state to payroll everywhere.

3. Gross Receipts—ratio of gross receipts in state to gross receipts everywhere.

Applies only to foreign corporations. Domestic corporations pay a capital stock tax on same basis, with Property the single allocation factor (assets in Pennsylvania to total).

Note: Three factor formula applied alike to domestic and foreign corporations in allocating net income for Corporate Net Income Tax.

Statutory reference: Act of June 1, 1889, Public Laws 420, Sec. 21.

SOUTH CAROLINA

Basis: paid-up capital stock and paid-in surplus.

Allocation factors: Three formulas, depending on type of business:

1. Manufacturing: Property and Costs of Manufacturing—average of the ratio derived by dividing real estate and tangible personal property in state by total everywhere and ratio derived by dividing manufacturing costs in state by total everywhere.

2. Selling: Property and Sales—average of the ratio derived by dividing property in state by property everywhere and sales in state by total sales.

3. Other—Gross Receipts—ratio of gross receipts in state to total gross receipts.

Applies to domestic and foreign corporations (domestic as of January 1, 1955).

Statutory reference: Code of South Carolina, 1952, as amended, Title 65, Chap. 9, Sec. 65-604.

TEXAS

Basis: Outstanding capital stock, surplus, undivided profits and debt with one year or more maturity.

Allocation factors: Gross Receipts: ratio of gross receipts from business done in Texas to gross receipts everywhere. However, tax base shall be no less than assessed value, for county ad valorem tax purposes, of property owned in the state.

Applies to both domestic and foreign corporations.

Statutory reference: Revised Civil Statutes, Title 122, Chap. 3, Article 7084.

WASHINGTON

Basis: authorized capital stock.

Allocation factors: Business (Gross Revenue)—ratio of

volume of business in state to total (gross revenue, sales, etc.).

Applies only to foreign corporations.

Statutory reference: Revised Code of Washington, Title 23, Chap. 28, Sec. 23.28.060.

WEST VIRGINIA

Basis: issued and outstanding capital stock.

Allocation factors: Property. The proportion of property owned and used in West Virginia to property owned and used everywhere.

Applies only to foreign corporations.

Statutory reference: Code of West Virginia of 1931, Chap. 11, Art. 12, Sec. 80.

TABULAR SUMMARY OF ALLOCATION FACTORS

(Franchise taxes based primarily on capital stock value)

	Allocation Factors			Type of Corporation	
	Property	Gross Receipts	Payrolls	Foreign	Domestic
Arkansas	x			x	x
Colorado	x			x	
Florida	x[1]	x[1]		x	[2]
Georgia	x	x		x	
Kansas	x	x		x	
Kentucky	x	x	x[3]	x	x

Louisiana	x	x		x	x
Michigan	x	x	x	x	x
Mississippi	x	x		x	x
Missouri	x			x	x
New Jersey	x[4]	x[4]	x[4]	x	x
New Mexico	x	x		x	x
North Carolina	x[5]	x[5]		x	x
Ohio	x	x		x	x
Oklahoma	x	x		x	x
Pennsylvania	x	x	x	x	[6]
South Carolina	x[5]	x[5]		x	x
Texas		x		x	x
Washington		x		x	
West Virginia	x			x	

1—One or the other, not both.

2—Status of domestic corporations not clear.

3—Business factor includes sales, purchases and payrolls.

4—Either property or business used, not both. Business factor based on property, receipts and payrolls.

5—Both used for corporations engaged in selling; property and costs used for manufacturing corporations; receipts only for others.

6—Domestic corporations pay a capital stock tax with property the only allocation factor.

SOURCE: Commerce Clearing House, TAX SYSTEMS OF THE WORLD and STATE TAX REPORTER SERIES.

No. 354

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In the Supreme Court of the State of Michigan

Appeal from the Circuit Court for the County of Ingham
Honorable Louis E. Coash, Circuit Judge

Panhandle Eastern Pipe Line Company,
a Delaware corporation

Plaintiff-Appellee,

vs.

Michigan Corporation and Securities Commission and Michigan Corporation Tax Appeal Board,

Defendants-Appellants.

Record on Appeal

Thomas M. Kavanagh
Attorney General

Edmund E. Shepherd
Solicitor General

T. Carl Holbrook
William D. Dexter
Assistants Attorney General

For Defendants-Appellants

Bodman, Longley, Bogle,
Armstrong & Dahling
Attorneys at Law
1400 Buhl Building
Detroit 26, Michigan

For Plaintiff-Appellee

SPEAKER-HINES AND THOMAS, INC., STATE PRINTERS, LANSING, MICH.—1956

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Date		Proceedings
1954		
March	9	Petition filed
	9	Stipulation to extend time to file transcript of record filed
	9	Proof of service of petition filed
April	29	Stipulation and proceedings had before the Michigan Corporation Tax Appeal Board filed
1955		
Sept	13	Opinion of the court filed
Oct	14	(Judgment) Order remanding computation of annual franchise tax, no costs allowed, filed
	20	Notice of entry of order and proof of service filed
	14	Notice of presentment of order and proof of service filed
	20	Clerk's notice of entry of judgment filed
	25	Order modifying order of October 14, 1955 filed
	28	Claim of appeal, notice of appeal and reasons and grounds for appeal filed
	28	Proof of service of claim of appeal, notice of appeal and reasons and grounds for appeal filed
Nov	2	Order extending time to February 15, 1956 in which to settle the record on appeal
Nov	25	Stipulation regarding settled record on appeal
	25	Certificate of the court

In the Supreme Court of the State of Michigan

Appeal from the Circuit Court for the County of Ingham
Honorable Louis E. Coash, Circuit Judge

Panhandle Eastern Pipe Line Company,
a Delaware corporation

Plaintiff-Appellee,

vs.

Michigan Corporation and Securities Commission and Michigan Corporation Tax Appeal Board,

Defendants-Appellants.

Record on Appeal

I

Proceedings before the Corporation Tax Appeal Board.[*]

1

(Filed April 29, 1954)

STATE OF MICHIGAN

BEFORE THE MICHIGAN PRIVILEGE FEE APPEAL BOARD

(Constituted by Section 450.309 of the Compiled Laws of 1948 consisting of the Attorney General, the State Treasurer and the Auditor General)

---

[*]
The cause in the circuit court below was on appeal of the appellee from a determination of its 1952 annual corporate franchise fee by the corporation tax appeal board.

(Petition) in the Matter of the Appeal of Panhandle Eastern Pipe Line Company, a Delaware corporation, as Amended

Panhandle Eastern Pipe Line Company, a Delaware corporation, duly admitted to do business in the State of Michigan, hereby appeals from a decision of the Corporation and Securities Commission of the State of Michigan incorporated in letters from such Commission dated August 28, 1953, and August 31, 1953, fixing the annual privilege fee of such corporation for the year 1952 at the sum of $24,539.59. Copies of said letters are attached hereto and marked Exhibit "A" and "B", respectively.

In support of such appeal, this appellant respectfully asserts that the Commission, contrary to the intent and requirement of Section 5e of Act 183 of the Public Acts of 1952, and in violation of the Commerce Clause of the United States Constitution (Article I, Section 8) and in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, has improperly failed and refused to adjust and apportion the allocation factors under said Act.

In further support of such appeal this appellant attaches hereto and hereby makes a part hereof (by incorporation by reference to and from the original papers filed with the Board) the following documents:

1. Michigan Annual Report—1952, transmitted to the Commission on August 28, 1952, copy of which Report is attached hereto as Exhibit "C".

2. Letter from appellant to Commission dated August 28, 1952, transmitting Michigan Annual Report—1952, together with appellant's check in the sum of $17,561.89, and together with copy of appellant's annual stockholders' report for 1951, copy of which letter is attached hereto and marked Exhibit "D".

3. Appellant's annual stockholders' report for 1951, attached hereto as Exhibit "E".

4. Copy of letter of Commission addressed to appellant, dated February 12, 1953, in which the Commission computes the privilege fee in accordance with the factors of property, compensation, and receipts, without referring to the factors employed by appellant in its Michigan Annual Report—1952, confining itself to mere acknowledgment of receipt thereof, together with the remittance in connection therewith of $17,561.89, and demanding payment of the additional sum of $6,977.70, copy of which letter is attached hereto and marked Exhibit "F".

5. Letter from appellant to Commission dated February 24, 1953, in which appellant takes exception to the Commission's demand, made in its letter of February 12, 1953, for an additional payment of $6,977.70, citing Section 5e of Act 183 of the Public Acts of 1952, in support of the formula employed by appellant in its Michigan Annual Report—1952, copy of which letter is attached hereto and marked Exhibit "G".

6. Letter from Commission to appellant dated March 31, 1953, in which, among other things, the Commission indicated that if appellant desired to invoke the provisions of Section 5e of Act 183 of the Public Acts of 1952, it should do so prior to April 15, 1953, in order

that the Commission might proceed to a final determination of the privilege fee, copy of which letter is attached hereto as Exhibit "H".

7. Letter from appellant to Commission dated April 6, 1953, in which appellant invoked the provisions of Section 5e of Act 183 of the Public Acts of 1952 and requested an opportunity to confer informally with the Commission in connection therewith, copy of which letter is attached hereto and marked Exhibit "I".

8. Letter from appellant to Commission dated May 22, 1953, following informal conference held with John R. Dykema, Commissioner, on April 23, 1953, in which letter appellant sets forth in detail the grounds on which it predicated its invocation of Section 5e of Act 183 of the Public Acts of 1952, copy of which letter is attached hereto and marked Exhibit "J".

9. Graph showing traffic units (MCF volume x miles transported) applicable to Michigan and to the various other states in which appellant's pipe line operations are conducted, marked Exhibit "K".

10. Detail with reference to allocation factors urged by appellant pursuant to Section 5e of Act 183 of the Public Acts of 1952, showing basis on which ratios have been arrived at, marked Exhibit "L".

WHEREFORE, this appellant, Panhandle Eastern Pipe Line Company, conceiving itself aggrieved by such determination by the Michigan Corporation and Securities Commission of its annual privilege fee for 1952 asks that this Board:

(a) Determine that its said privilege fee for the year 1952 has been paid in full, or

(b) Fix its said privilege fee for the year 1952 at the sum of $17,613.45, or

(c) Find that the receipts factor prescribed by Section 5 of the Act should be apportioned or allocated to Michigan in the ratio which Panhandle Eastern's pipe line mileage, or traffic units, or property (or some such other basis), in Michigan, bears to Panhandle Eastern's pipe line mileage, traffic units, or property (or some such other basis), everywhere, so that the formula for fixing the privilege fee for 1952 should be as follows:

Definitions:

A Paid up Capital and Surplus.

B Ratio of property in Michigan to total property.

C Ratio of payroll in Michigan to total payroll.

D Ratio of intrastate receipts plus a percentage of the interstate receipts to total receipts, the percentage of interstate receipts to be included to be determined by some such ratio as the mileage of pipe line in Michigan to mileage everywhere, traffic units in Michigan to traffic units everywhere, property in Michigan to property everywhere, or some such other basis of comparison, but assuming, in this instance, that the proportion of interstate receipts to be added to intrastate receipts shall be the ratio of mileage of

pipe line in Michigan to mileage everywhere.

X Annual Franchise Fee.

Formula:

$$X = .004A \left(\frac{B + C + D}{3} \right)$$

Solution:

Let
A = $66,297,747
B = 5.0304%
C = 3.3512%
D = 4.6020%

$$X = .004 \times 66{,}297{,}747 \left(\frac{5.0304 + 3.3512 + 4.6020}{3} \right)$$

X = $11,476.94, or

(d) Find that a special formula should be used in the determination of its annual privilege fee for the year 1952 pursuant to the provisions of Section 5e of Act 183, of the Public Acts of 1952, or

(e) Find that the formula for the fixing of its privilege fee for the year 1952 should be as follows:

Definitions:

A Paid up Capital and Surplus.
B Ratio of traffic units in Michigan to total traffic units.
C Ratio of production in Michigan to total production.
D Ratio of property value in Michigan to total property value.
E Ratio of operating expenses in Michigan to total operating expenses.

F Ratio of receipts in Michigan to total receipts.

X Annual Franchise Fee.

Formula:

$$X = .004A \left(\frac{B + C + D + E + F}{5} \right)$$

Solution:

Let

A = $66,297,747

B = .027100

C = .040558

D = .050304

E = .020360

F = .193769

$$X = .044 \times \$66,297,747 \left(\frac{.027100 + .040558 + .050304 + .020360 + .193769}{5} \right)$$

X = $17,613.45

PANHANDLE EASTERN PIPE LINE COMPANY

By O. W. Morton, Vice-President

STATE OF MISSOURI)
COUNTY OF JACKSON) ss.

O. W. Morton, being duly sworn, deposes and says that he is Vice-President of Panhandle Eastern Pipe Line Company, a Delaware corporation, and that he has read the foregoing petition signed by him in behalf of said Panhandle Eastern Pipe Line Company and knows the contents thereof and that the same are true except

as to matters therein stated on information and belief and as to such matters he believes it to be true, and that he is duly authorized to sign such petition on behalf of said corporation.

(s) O. W. Morton

Subscribed and sworn to before me
this 27th day of November A.D. 1953.

(s) R. B. Scudder,
Notary Public, Jackson County, Missouri.

My Commission expires: January 27, 1957.

2

(Filed April 29, 1954)

Michigan Corporation and Securities Commission

Bank of Lansing Building, Lansing 4

August 28, 1953

Panhandle Eastern Pipe Line Company
1221 Baltimore Avenue
Kansas City 6, Missouri

Attention: D. A. Robertson, Assistant Secretary

Gentlemen:

The company's petition under Section 5e of P.A. 85 of 1921, as amended, for adjustment of the allocation factor to be used in computing its 1952 franchise tax has been considered.

The company requests the addition of two factors to the three-factor formula imposed by Section 5 of the act. The factors requested are—

1. "Traffic units" which may be defined as the number of 1000 cubic feet of gas transported in each mile of pipe line facilities in Michigan divided by the number of 1000 cubic feet of gas transported in each mile of the entire system, and

2. Production, which is defined as the number of 1000 cubic feet of gas produced in Michigan divided by the number of 1000 cubic feet of gas produced in the entire system.

The company argues that inasmuch as transportation and production of gas are among its principal activities, special consideration should be accorded them in the taxing formula. The Commission rules against the company on these points.

The formula set out in the statute was the result of a conscious legislative judgment. It should be noted that the property factor in the statutory formula provides relief to the taxpayer for the extensive out-of-state activity represented by its pipe line. Although the Legislature considered transportation as a proper subject for exceptional treatment, the Commission has no doubt that where it is coupled with sale, the general formula is reasonable, and does not, in the opinion of the Commission, result in an improper and unfair allocation as to this taxpayer.

The activity entailed in producing gas is reflected in the statutory formula in the payroll and property factors.

The company has not sustained the burden of showing that the conscious judgment of the Legislature resulted in an unfair allocation in its case. Computation and payment in accordance with this ruling is requested.

Very truly yours,
/s/ James C. Allen
James C. Allen
Commissioner

JOA-L

3

(Filed April 29, 1954)

M/dg Corporation

April 31, 1953

Panhandle Eastern Pipe Line Company
1221 Baltimore Avenue
Kansas City 6, Missouri

Gentlemen:

A final determination of your 1952 privilege fee has been made in accordance with the enclosed ruling of this commission, dated August 28, 1953.

Ratio:	Property	.050303
	Compensation	.033512
	Receipts	.193769
	3	/.277584
	Average	.092528

Form 179

THE REPORT SHALL BE FILED IN DUPLICATE IN THE MONTH OF JULY OR AUGUST
Please Read Carefully Instructions on Back of this Form before Executing this Report

MICHIGAN ANNUAL REPORT—1952

This report must be filed in DUPLICATE by every corporation for profit, whether domestic or foreign.
(two white copies)

(Name of Corporation) PANHANDLE EASTERN PIPE LINE COMPANY /
(Type or Print)

(Address) 1221 BALTIMORE AVENUE, KANSAS CITY 6, MISSOURI
No. Street City (Zone) State

Commissioner, Michigan Corporation and Securities Commission, Lansing, Michigan.

Sir:— In accordance with the provisions of Act No. 327, Public Acts of 1931, as amended, the above named corporation, by the undersigned officers thereof, submits the following report of its condition on the 31st day of December, 1951, or
(Do not change this date)

/(close of fiscal year next preceding the time for filing; or the date of incorporation or admittance
(Date)
during 1952).

1. (a) The place or places of doing business either within or without Michigan is (are) 1221 Baltimore Avenue, Kansas City 6, Missouri and 120 Broadway, New York 5, New York /
   (b) Resident Agent (In Michigan) Clayton F. Jennings /
   (c) Address of Registered Office (In Michigan) 1400 Olds Tower Bldg., Lansing, Michigan
   (Foreign Corporation—state Principal Office in Michigan)
2. Where Incorporated Delaware Date of Incorporation December 23, 1929
   (State)
   Term of corporate existence Perpetual Date Admitted July 21, 1942 -
   (Foreign corporation—date admitted to do business in Michigan)
   The act under which incorporated or reincorporated
3. The following are the officers and directors or trustees of the corporation at date of balance sheet, given in this report:

OFFICERS

Term of corporate existence [illegible] Date Admitted [illegible]
(Foreign corporation—date admitted to do business in Michigan)

The act under which incorporated or reincorporated .....

3. The following are the officers and directors or trustees of the corporation at date of balance sheet, given in this report:

OFFICERS

Office	*Name*	*Residence Addresses*
Chairman of the Board	William G. Maguire	435 E. 52nd St. New York 22, New York
President	Edward Buddrus	4826 Roanoke Pkwy., Kansas City, Mo.
Vice-Presidents	C. H. M. Burnham	67th & Antiock R. R. No. 2, Merriam, Kans.
	Leslie T. Fournier	164 N. Van Dien Ave., Ridgwood, N. J.
	Oscar W. Morton	4240 Brookridge Drive, Mission, Kans.
	Frederick H. Robinson	669 Delafield Lane, Riverdale, N. Y.
Secretary-Controller	Leith V. Watkins	P. O. Box No. 286, Far Hills, New Jersey
Treasurer	Leslie T. Fournier	164 N. Van Dien Ave., Ridgewood, N. J.
Assistant Secretary and Assistant Controller	Donald A. Robertson	439 W. 68 St., Kansas City, Missouri
Assistant Treasurer	Frank D. Mathias	5000 Lydia St., Kansas City, Missouri

DIRECTORS

Name	*Residence Addresses*
John E. Bierwirth	Briarwood Crossing, Cedarhurst, L. I.
Edward Buddrus	4826 Roanoke Pkwy., Kansas City, Mo.
Hy Byrd	10 Briar Oaks Lane, Houston, Texas
J. Donald Duncan	4 Sutton Place, New York 22, New York
Louis C. Gerry	79 Williams St., Providence 6, R. I.
Frank J. Lewis	4929 Woodlawn Ave., Chicago, Illinois
William G. Maguire	435 E. 52nd St., New York 22, New York
Charles E. Main	271 Manor Road, Ridgewood, New Jersey
Robert P. Patterson (Died January 22, 1952)	1 E. 87th St., New York 28, New York

4. Capital stock, at date of balance sheet given in this report: December 31, 1951

Shares With Par Value	Amount Authorized	No. of Shares Authorized	Amt. Subscribed But not Issued (at par)	Amount Issued	Par Value per Share
Common -	$		$	$	$
Common -	$		$	$	$
Preferred -	$ 14 262 500 00	142,625	$ None	$ 13 262 500 00	$ 100 00
Preferred -	$		$	$	$
Total -	$ 14 262 500 00		$ None	$ 13 262 500 00	

Shares Without Par Value	No. of Shares Authorized	No. of Shares Subscribed	Amt. Subscribed (at sale price) (1)	No. of Shares Issued	Book value per share and price fixed for sale or exchange
Class: Common	shs. 4 000 000	shs. 3 240 000	$ 20 250 000 00	shs. 3 240 000	Book value $ (1) Price fixed for sale or exchange $
	shs.	shs.	$	shs.	Book value $ Price fixed for sale or exchange $

4A. If the corporation has purchased, or otherwise acquired, any of its capital stock, or has disposed of any shares acquired during the current year or prior thereto, state separately the number of shares of each class of stock acquired or disposed of during the year, the consideration paid or received by the corporation for such stock, and the number of shares and cost of such stock remaining at December 31, 1951 (or close of fiscal year).

Through sinking fund operation the Company during the year 1951 redeemed and retired 2,830 shares of its 4% Cumulative Preferred Stock. The total consideration paid therefore was $276,062.20.

5. If the cost of the stock purchased and held at December 31, 1951 (or close of fiscal year), as set forth in item No. 4-A, has not been deducted from surplus, show the amount of surplus applied to such purchases None

Form 279

(2) Personal Service compensation (...

Gas Plant →			
Total of item 8	209 612 343		
Less reserve for depreciation and depletion	$ 50 091 846	9 334 284	150 186 213
9. **Patents** (To include copy-rights, trade-marks, etc.)			
10. **Good Will**			
11. **Other Assets** (describe fully)	$		
U. S. Government Obligations	996 030		
			996 030 ✓
12. **Total Assets**		$ 9 345 063	$ 194 648 570
***LIABILITIES**			
13. **Notes and Accounts Payable**		$ 129 585 067	(1)
14. **Accrued Expenses**		6 659 533	
15. **Other Liabilities** (describe fully):	$		
Deferred Credits	1 451 286		
Other Reserves	1 051 416		
		2 502 702	✓
16. **Capital Stock:** Common stock	$		
Preferred stock	$ 13 262 500		✓
Non-par stock (No. of shares 3,240,000)	$ 20 250 000	33 512 500	
17. **Schedule of surplus and undivided profits** (Enter deficit in red) Earned	31 439 864		
Appreciation of value			
Paid-in arising from sale of preferred stock	293 967		
Total surplus			
Less, Treasury Stock (shares) at cost			✓
Amount of surplus applied to purchase of its capital stock		31 733 831	
18. **Total Liabilities**	$	$ 203 993 633	✓

***If a written copy of balance sheet statement is furnished to shareholders, please attach a copy hereto. In case corporation issues a consolidated statement to shareholders, show financial statement of reporting company only and not the consolidated one.**

8. Number and kind of shares issued for property during 1951 or other period covered by this report None

Description of such property

Value at which such property was taken

(1) Includes $[illegible],000,000 in Long Term Debt. (Bonded and Sinking Fund Debentures)

6. The amount of capital stock paid in at date of balance sheet given in this report $ 33 512 500

(This shall include stock issued for goodwill, patents, formulas, or any other intangible property).

7. The following is a **true and complete statement** of the **assets and outstanding liabilities** of the corporation, as shown by its books and is **the same balance sheet statement as furnished or to be furnished to shareholders,** showing the condition at the date stated, and segregated to show for the purpose of computing this tax, the nature, location and value of all property owned by the corporation both within and without Michigan.

*ASSETS	Amount	In Michigan	Without Michigan
1. **Cash**		$ 10 779	$ 4 462 938
2. **Notes and Accounts Receivable**	$ 8 979 651		8 549 651
Less reserve for bad debts	430 000		
3. **Deferred Payment notes, contracts, etc.**	$		4 231 502
4. **Inventories:** (To include raw materials, work in process, finished goods, supplies, etc.)			25 662 213
5. **Investments**			
6. **Loans**			560 023
7. **Deferred charges:** Prepaid insurance, taxes, etc.			
8. **Capital assets:** Land			
Buildings	$		
Machinery and equipment			
Furniture and fixtures			
Delivery equipment			

9. The aggregate amount of any loans, advances, overdrafts and/or withdrawals and repayments thereof made to or by officers, directors or shareholders of the corporation otherwise than in the ordinary and usual course of business and on the ordinary and usual terms of payment and security.

$ None

10. The nature and kind of business in which the corporation is engaged Owns and operates oil and gas leases and a pipe line system for the transmission of natural gas in interstate commerce and is engaged in the production, purchase, transmission and sale of gas.

11. List the name and address of every subsidiary and affiliated corporation, foreign and/or domestic, owning stock in this corporation, together with the number of shares owned. (a rider may be attached if required)

12. Give name and address of persons, other than officers or employees, who prepared, counselled, or assisted in preparation of this report None

CORPORATIONS WHICH MAINTAIN A REGULAR PLACE OF BUSINESS OUTSIDE MICHIGAN, OTHER THAN A STATUTORY OFFICE, FILL IN FULLY SPACES BELOW:

This report covers the period from January 1, 1951 to December 31, 1951:

	In Michigan	Total
(1) Average value of Real property and Tangible personal property (including inventories and building erected on leased land by or on behalf of leasee)	$ 7,573,688	$152,193,728
Annual Gross rents paid or accrued, × 8	168,489	1,714,148
Total Property and Gross Rents	7,742,177	153,907,876
Ratio of In Michigan to Total		5.0304%
(2) Personal Service compensation (wages, salaries, etc.)	253,277	7,557,681

	tories and building erected on leased land by or on behalf of leasee)	$ 7,573,688	$152,193,728
	Annual Gross rents paid or accrued, × 8	168,489	1,714,148
	Total Property and Gross Rents	7,742,177	153,907,876
	Ratio of In Michigan to Total		5.0304%
(2)	Personal Service compensation (wages, salaries, etc.)	253,277	7,557,681
	Ratio of In Michigan to Total		3.3512%
(3)	Receipts from sales of Tangible personal property—		
	Located in Michigan, delivered in Michigan	1,134,268	
	Located outside Michigan, delivered in Michigan ÷ 2	8,999,659	
	Total Receipts	10,133,927	52,298,971
	Ratio of In Michigan to Total		19.3769%
(4)	Gas Purchased	....	13,538,258
	Ratio of In Michigan to Total		....%
(5)	Operating Expenses	284,535	5,318,989
	Ratio of In Michigan to Total		5.3494%
	Average Ratio (Total ÷ 5)		6.6216%

CORPORATIONS WHICH DO NOT MAINTAIN A REGULAR PLACE OF BUSINESS OUTSIDE OF MICHIGAN OTHER THAN A STATUTORY OFFICE PAY ON ENTIRE PAID-UP CAPITAL STOCK AND SURPLUS.

Tentative computation of fee by Corporation: (4 mills on the dollar).

Average ratio 6.6216

Filing fee - - - - $ 2.00

Paid-up Capital - - $ 8 876 26

Surplus - - - - - $ 8 683 63

TOTAL - - - $ 17 561 89

PANHANDLE EASTERN PIPE LINE COMPANY
(corporate name)

By [signature] Vice-President

and

By D A Robertson Asst. Secretary

or

By _____ Treasurer
(Signature of two different individuals required) (see instructions)

Dated August 28, 1952
(Date of signing report)

(Do not fill in space below)

Corporations with divided assets.

Average ratio _____

Paid-up capital _____

Surplus _____

Fee as computed by the Michigan Corporation and Securities Commission.

$ 2.00, filing fee.

$ _____, on capital stock.

$ _____, on surplus.

Total $ _____

Difference $ _____, due state.

$ _____, due corporation.

False statements; penalties. In case any corporation, which is required to file the report and/or pay the fees as provided in this act, shall wilfully make any false statement in such report, such corporation shall be subject to an additional penalty in the sum of fifty per cent of the amount of franchise or privilege fee required to be paid. Such penalty shall in no case be less than fifty dollars nor more than ten thousand dollars.

Paid in capital	$33,512,500 x .092528 x .004 =	$12,403.38
Surplus	32,785,247 x .092528 x .004 =	12,134.21
	Filing fee	2.00
	Total Fee	24,539.59
	Remitted	17,561.89
	Due State	$ 6,977.70

Kindly remit this amount due the state.

Very truly yours,
Ann Sawasky
Director, Annual Reports

4

(Filed April 29, 1954)

Appellee's Annual Report for 1952

5

(Filed April 29, 1954)

August 28, 1952

Michigan Corporation and Securities Commission
Post Office Box 898
Lansing 4, Michigan

Gentlemen:

Enclosed for filing with you is the Michigan Annual Report for year 1952 in duplicate, (Form 279), together with our check for $17,561.89, to cover the franchise tax

or privilege fee in accordance with the computation a shown on report.

Copy of this Company's Annual Stockholder's Repor for the year 1951 is attached.

Yours very truly,

WJK:sed
cc: Mr. Leith V. Watkins

D. A. Robertson
Assistant Secretary

6

(Filed April 29, 1954)

Michigan Corporation and Securities Commission

Bank of Lansing Building, Lansing 4

February 12, 1953

M/rs
Corporatio

Panhandle Eastern Pipe Line Company
1221 Baltimore Avenue
Kansas City 6, Missouri

Gentlemen:

On September 2 we received your 1952 annual report and remittance of $17,561.89. The ratio has been computed in accordance with Section 5, Act 183, Public Acts of 1952.

Therefore, the privilege fee is figured as follows:

Ratio:	Property	.050303
	Compensation	.033512
	Receipts	.193769
		3/.277584
Average Ratio		.092528

Paid in capital	$33,512,500 x .092528 x .004 =	$12,403.38
Surplus	32,785,247 x .092528 x .004 =	12,134.21
Filing fee		2.00
Total Fee		24,539.59
Remitted		17,561.89
Due State		$ 6,977.70

Kindly remit this amount due the State.

Very truly yours,

/s/ Ann Sawasky
Ann Sawasky
Director, Annual Reports

7

(Filed April 29, 1954)

Panhandle Eastern Pipe Line Company

February 24, 1953

Michigan Corporation and Securities Commission
Bank of Lansing Building
Lansing 4, Michigan

Gentlemen:

Attention of Ann Sawasky
Director, Annual Reports

Consideration has been given to your letter of February 12, 1953, requesting an additional payment by us of $6,977.70. Further review of our filing has not changed our opinion as to our method of calculation as being correct. You have not shown us in you letter any reason to support your request for the additional payment. We believe that the items we included in our computation are the minimum ones that we can use to correctly and fairly determine the tax. Your attention is invited to Section 5e of Senate Bill No. 321 which is quoted as follows:

"Sec. 5e. If it shall appear on the application of the taxpayer or otherwise that an allocation factor determined pursuant to this act does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state, the commission shall adjust it by:

(1) Excluding 1 or more of the factors or any component thereof;

(2) Including 1 or more other factors, such as expenses, purchases, contract values (minus subcontract values);

(3) Excluding proportionately 1 or more asset items in computing entire paid-up capital and surplus; or

(4) Applying any other similar method calculated to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to this state.

The commission shall promptly publish its rulings with respect to any application of the provisions of this section. Such rulings shall be promulgated in conjunction with the state department of revenue."

Up to date we have not been informed of any rulings promulgated by the Commission with respect to the application of the aforequoted section.

Very truly yours,

D. A. Robertson
Assistant Secretary

cc Mr. Leith V. Watkins

8

(Filed April 29, 1954)

Michigan Corporation and Securities Commission
2000 Cadillac Square Building
Detroit 26, Michigan

March 31, 1953

Panhandle Eastern Pipe Line Company
1221 Baltimore Avenue
Kansas City 6, Missouri

Attention: Mr. D. A. Robertson

Re: 1952 Annual Report and
Franchise Tax

Gentlemen:

Your correspondence with Miss Sawasky of this Commission has been referred to me, particularly your letter of February 24th, 1953.

It appears that the 1952 annual report of the corporation was filed in timely fashion and accompanied by your check for $17,561.89 to cover the franchise fee and filing fee. The fee was computed by means of a five-factor formula.

The applicable statute, Public Act 85 of 1921 as amended, particularly by Act 183, 1952, provides for allocation of the capital and surplus of corporations doing business in more than one state by means of a formula which is composed of three factors: Real and Tangible personal property, personal service compensation, and

receipts from sales, services, and rentals. The Act concludes with section 5e which you quoted in your letter of February 24th.

Act 85 of 1921, as amended, sets out in section 5 a three-factor formula intended by the legislature to produce a fair and proper reflection of the activity, business, receipts and capital of multi-state businesses attributable to Michigan. The Commission permits allocation factors to be computed otherwise only on a showing that the allocation factor thus determined works unfairly in a specific case. Your corporation has submitted nothing from which it appears or can appear that an allocation factor determined under section 5 is improper or unreasonable. That is the reason for the Commission's letter of February 12th.

If you desire to invoke the provisions of section 5e, kindly advise us at your early convenience. We will be glad to make appropriate procedural arrangements in the near future. Please let us know on this question before April 15th so that we may proceed to a final determination of the privilege fee.

The Commission has published to date, only a few rulings, with respect to application of the provisions of section 5e. I enclose copies for your information.

Very truly yours,

JOHN R. DYKEMA
/s/ John R. Dykema
COMMISSIONER

JRD:ac
enc.

9

(Filed April 29, 1954)

Panhandle Eastern Pipe Line Company

April 6, 1953

Mr. John R. Dykema, Commissioner
Michigan Corporation and Securities Commission
2000 Cadillac Square Building
Detroit 26, Michigan

Re: 1952 Annual Report and Franchise Fee

Dear Mr. Dykema:

We acknowledge receipt of your letter of March 31, 1953, in answer to our earlier correspondence with Miss Sawasky of your Commission.

It is our opinion that the nature of Panhandle Eastern Pipe Line Company's business is such as to make inappropriate rigid adherence to the allocation factors set forth in the statutory formula. We think such formula works unfairly in our case and results in a somewhat distorted picture of the activities of the Company properly attributable to Michigan.

We would like, therefore, to invoke the provisions of Section 5e of the Statutes and, in connection therewith, would appreciate very much the opportunity of conferring informally with you concerning our position in the premises. If you will be so kind as to indicate when and where we might see you, we shall arrange, if at all pos-

sible, to be present at such time and place as you may indicate.

With kindest regards, we remain

Very truly yours,

/s/ D. A. Robertson
D. A. Robertson,
Assistant Secretary.

cc L. V. Watkins.
E. H. Lange.

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(Filed April 29, 1954)

May 22, 1953

Mr. John R. Dykema, Commissioner
Michigan Corporation and Securities Commission
Bank of Lansing Building
Lansing 4, Michigan

Re: 1952 Annual Report and Franchise Fee

Dear Mr. Dykema:

The statutory three-factor formula prescribed in Section 5 of Public Act No. 183 of 1952, as applied to Panhandle Eastern Pipe Line Company, results in the attribution to the State of Michigan of a disproportionately large part of the capital stock and surplus of the Company which furnishes the tax base upon which the privilege fee is calculated.

Panhandle Eastern is a corporation organized and existing under the laws of the State of Delaware, with its principal office in Kansas City, Missouri. Panhandle owns and operates (under Certificates of Public Convenience and Necessity heretofore issued by the Federal Power Commission), an integrated natural gas pipe line system situated in the states of Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana, Ohio, and Michigan, and is a "natural gas company" as defined in the Natural Gas Act and is subject to the jurisdiction and control of the Federal Power Commission. Panhandle Eastern produces natural gas in the states of Texas, Oklahoma, Kansas and Michigan, and purchases natural gas produced in Texas, Oklahoma, and Kansas. Its production of gas in Michigan represents but a small part (4.0558 per cent in 1951) of its total production. Its pipe line system extends from Texas to northern termini in Michigan.

Panhandle Eastern's major activities fall into three categories: 1. Production and purchase of natural gas, 2. Transmission in interstate commerce, and 3. Selling in interstate commerce. Its activities are clearly distinguishable from those of the ordinary mercantile or manufacturing concern for the same general reasons as existed in the case of railroads, motor carriers, water carriers, and aircraft carriers. Like them, Panhandle Eastern is subject, in many facets of its business, to rigid regulation both by the Federal Government through the Federal Power Commission and State Governments through various State Commissions. Like them, Panhandle Eastern's receipts are the product or result of activities engaged in by the Company in other states than the one in which the customer resides, and the receipts largely constitute a return for the cost and expense of activities conducted beyond the borders of the particular state in

which such customer may reside and receive the fruit of these extra-state activities. Like them, Panhandle Eastern would appear to be entitled to be recognized by the taxing authorities as engaged in a business of such nature as to make inequitable and unfair the application of a tax formula which would work substantial justice in the case of an ordinary mercantile or manufacuring concern. In the case of railroads, motor carriers, water carriers, and aircraft carriers, the State of Michigan has expressly recognized that the nature of their business is such as clearly to entitle them to use tax formulas which differ in major respects from the formula proposed to be applied to ordinary mercantile or manufacturing concerns.

The nature of Panhandle Eastern's business is more nearly analogous to that, for purpose of computation of a privilege fee, of a transportation company. The Revenue Study Committee acknowledged that in connection with transportation by railway, trucks, and vessels, special allocation factors applicable to the particular business should be used. Were the operation within Michigan of long distance interstate gas transmission companies a matter of more frequent and common occurrence than at present, the Michigan statutes, no doubt, would have extended similar special and specific recognition to the problem of apportionment in the case of such gas transmission companies as in the case of aircraft carriers, railroads, and motor carriers. In Oklahoma, for example, and in a number of other states as well, where the presence of gas transmission lines is today, perhaps, as common as railroads, special recognition of gas transmission companies is accorded by the income tax statutes in permitting the apportionment of income on a "TRAFFIC UNIT" basis, a "TRAFFIC UNIT" consisting of

one MCF of gas carried one mile, the TRAFFIC UNITS within the state being compared to TRAFFIC UNITS everywhere. It is significant that in Oaklahoma, where TRAFFIC UNITS comprise only one of the three factors, OPERATING EXPENSE constitutes the second factor and PROPERTY the third. In addition, therefore, to recognizing the corporate activities inherently reflected by a TRAFFIC UNIT factor, the formula likewise gives recognition to the total OPERATING EXPENSE incurred by the corporate pipe line entity, as distinguished from that part of the OPERATING EXPENSES which falls under the heading of PAYROLL. In Nebraska, on the other hand, the agency administering the *franchise tax law* has made provision for a seven-factor allocation formula consisting of PROPERTY, MILES OF PIPE, TRAFFIC UNITS, OPERATING EXPENSE, EARNINGS, SALES AND PRODUCTION UNITS, and permitting the taxpayer to list such other factors as in its judgment truly reveals the relationship between total value of the company and value existing within Nebraska boundaries. Again it will be noted that TRAFFIC UNITS and OPERATING EXPENSE are included as factors applicable to the particular kind of business in which Panhandle Eastern is engaged. Similar special recognition of the problem of apportionment in the case of an interstate gas transmission company should be accorded in the State of Michigan under the provisions of Section 5(e) of the Franchise Tax Act. The provisions of such subsection were expressly designed to afford relief in any situation where, as in the case of Panhandle Eastern, the statutory formula does not properly reflect the corporate activities attributable to the State of Michigan.

Were the 4-mill rate to be applied to the statutory formula as it formerly existed, the resulting tax liability

of Panhandle Eastern would have been $12,148.00, contrasted with a tax of $24,537.59 that would be produced by application of the statutory formula prescribed in Section 5 of Public Act No. 183 of 1952, in accordance with the following calculation:

Old Formula Plus New Rate

	Ratio - Assets .045811	
Paid in Capital	$33,512,500 x .045811 x .04 =	$6,140
Surplus	32,785,247 x .045811 x .04 =	6,008
Total Fee		$12,148

New Formula Plus New Rate

Ratio - Property	.050303
Compensation	.033512
Receipts	.193769
	3/.277584
Average Ratio	.092528

Paid in Capital	$33,512,500 x .092528 x .004 =	$12,403.38
Surplus	32,785,247 x .092528 x .004 =	12,134.21
Total Fee		$24,537.59

The increase in tax liability of Panhandle Eastern resulting from the application of the statutory formula (exclusive of that portion of the increase that would have been incurred in any event by reason of the increase in rate), is disproportionately large and amounts to 102 per cent. While no statistics are available to us with

respect to the average increase to corporations as a whole resulting from the application of the statutory formula, it is wholly unlikely that the experience in the first year to which the statutory formula applies reflects anything approaching an over-all 102 per cent increase in the tax liability of reporting corporations. In fact, the three-factor formula was not adopted for the purpose of increasing the revenue but as a means of distributing the burden thereof more equitably. Actually, the estimate of the Revenue Study Committee was that state revenue would, by adoption of the three factor formula, be increased only about five per cent. Where, therefore, as in the case of Panhandle Eastern, the application of the statutory formula results in a 102 per cent increase instead of the approximate five per cent increase envisaged by the Revenue Study Committee, the operation of the formula, as applied to Panhandle Eastern, at once becomes suspect and open to serious question as to its fairness as applied to Panhandle Eastern in comparison with the results it produces as applied to other corporations, the nature of whose business is quite unrelated to that conducted by Panhandle Eastern.

In accordance with the foregoing, therefore, Panhandle Eastern makes application for adjustment in the statutory formula prescribed by Section 5 of Public Act No. 183 of 1952 by substituting therefor a five-factor formula which recognizes the particular nature of Panhandle Eastern's business as somewhere between that of an ordinary common carrier and that of an ordinary mercantile or manufacturing concern, but partaking in substantial measure of some of the aspects of each, though more clearly analogous, perhaps, to that of a transportation company than an ordinary unregulated business concern, and which comports more realistically with the

threefold aspects of Panhandle Eastern's business—PRODUCTION, TRANSMISSION, and SALES. The formula urged by Panhandle Eastern continues in full effect the two statutory apportionment factors of RECEIPTS and PROPERTY, merges the third factor of PAYROLL into OPERATING EXPENSES, and incorporated two new factors, TRAFFIC UNITS and PRODUCTION. Because, therefore, the allocation factors set forth in Section 5 of Public Act No. 183 of 1952 do not properly reflect the business activities of RECEIPTS and CAPITAL of Panhandle Eastern reasonable attributable to the State of Michigan, Panhandle Eastern requests the Commission to adjust such factors by adopting, in lieu thereof, the following factors:

TRAFFIC UNITS
PRODUCTION (MCF)
PROPERTY
OPERATING EXPENSES
RECEIPTS

Upon the basis of the proposed allocation factors, the franchise tax due and payable to the State of Michigan under and in connection with the 1952 annual report would be as set forth in the following calculation:

Ratio -	Traffic Units	.027100
	MCF Produced	.040558
	Property	.050304
	Operating Expenses	.020360
	Receipts	.193769
	Divided by	5/.332091
	Average Ratio	.066416

Paid in Capital	$33,512,500 x .066,418 x .004 =	$ 8,903.33
Surplus	32,785,247 x .066,418 x .004 =	8,710.12
Total Fee		$17,613.45

The formula proposed by Panhandle Eastern would, as above indicated, result in a tax of $17,613.45 which is $53.56 higher than that reflected by Panhandle Eastern's 1952 Annual Report. Even this tax of $17,613.45 is 44.99 per cent higher than would otherwise have been required to be paid by Panhandle Eastern had there been no change in the formula as it existed prior to the adoption of the new law but only an increase in the rate from 3½ mills to 4 mills, as contrasted with the 102 per cent increase that would be imposed upon Panhandle Eastern under the statutory three-factor formula to which exception is here taken.

We would very much appreciate your furnishing our attorney, Mr. H. I. Armstrong, of 1400 Buhl Building, Detroit 26, Michigan, as well as ourselves, of course with a copy of your decision.

Very truly yours,

D. A. Robertson,
Assistant Secretary.

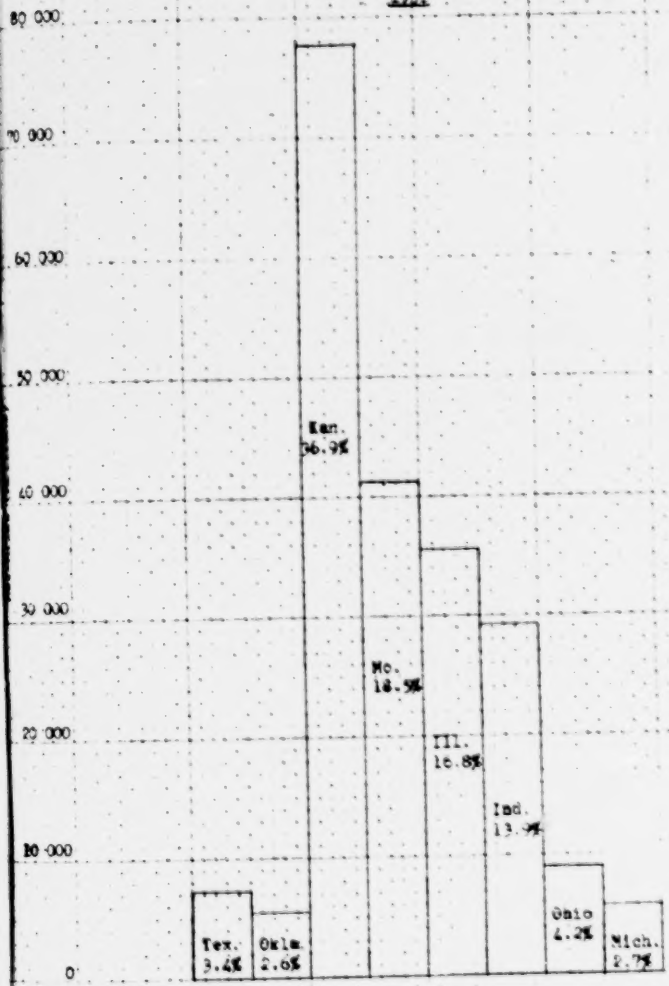
LAR:lms
cc Mr. H. I. Armstrong,
Bodman, Longley, Bogle,
Armstrong & Dahling,
1400 Buhl Building
Detroit 26, Michigan.
Mr. L. V. Watkins.

EXHIBIT "K"

PANHANDLE EASTERN PIPE LINE COMPANY

Distribution of Traffic Units by States

1951



LEH

11

(Filed April 29, 1954)

Graph of traffic units

12

Detail of Allocation Factors

(Filed April 29, 1954)

PANHANDLE EASTERN PIPE LINE COMPANY
BASIS OF ALLOCATION FACTORS
STATE OF MICHIGAN PRIVILEGE FEE
1952

Factor	In Michigan	Total Company	% in Michigan
Traffic Units (In millions)	$ 5,736	$ 210,987	2.7100
MCF Produced	3,047,036	75,406,348	4.0558
Property	7,742,177	153,907,876	5.0304
Operating Expenses	537,812	26,414,928	2.0360
Receipts	10,133,927	52,298,971	19.3769
Total Percentages			33.2091
Divided by 5(Average)			6.6418

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(Filed April 29, 1954)

Testimony at hearing before the appeal board

In re: Appeal of the Panhandle Pipe Line Company from Determination of the Corporation Tax for 1952.

Hearing before the Corporation Tax Appeal Board—January 28, 1954.

Present: Frank G. Millard, Attorney General and Chairman
John B. Martin, Auditor General
R. Palmer Carr, representing D. Hale Brake, State Treasurer Corporation Tax Appeal Board

and Ann Sawasky, Director of Annual Reports, Corporation and Securities Commission

Gregory H. Frederick
T. Carl Holbrook
Assistant Attorneys General

For Panhandle Eastern Pipe Line Company:

Russell Voertman, Kansas City
D. A. Robertson, Assistant Secretary, Kansas City
Henry I. Armstrong, Bodman, Longley, Bogle, Armstrong & Dahling, Attorneys, Detroit.

Mr. Frederick made a statement of the facts in the case.

The Panhandle Company claimed that the factors con-

tained in section 5 are not equitable and, therefore, they are entitled to take advantage of section 5e of Act 183, Public Acts of 1952.

Mr. Frederick called attention to the amended petition filed by the Panhandle Company which sets forth the amended formula.

Thereupon ensued a discussion as to whether the company is in a position to ask to use the benefits of section 5e and, if so, what elements should be considered.

Mr. Martin: Should we have an explanation from the company first why they think section 5 is not applicable?

Mr. Millard: What are you relying on—your original computation or the amended computation?

Mr. Voertman: We are standing by our original computation, which is a little bit high. I don't think it is incumbent upon us to take the position that any one particular formula is the only right formula. The basic question is whether or not under section 5 it should be adjusted. We need not come up with a particular formula.

Mr. Holbrook: This matter is before the Corporation Tax Appeal Board and you have filed a tentative report. The Commission has set up a tax that you should pay. By so doing, they have determined that you come under section 5 and not section 5e. The figures are up to the Board to determine. You, in compiling your return and paying your tax, use the formula—payroll, property, gas, purchases, receipts and expenses. The question comes up: What type of formula should be used in your

1952 return? That is up to the Appeal Board to determine, whether you are entitled to use section 5e and, if you are, we are going to make the computation.

* * * *

Mr. Millard: You have submitted a return and the Corporation and Securities Commission says your return is not right. They have notified you that you owe $6,977.70. It is up to this Board to determine whether or not the claim is correct.

Mr. Armstrong: The Board has said positively that we are not entitled to section 5e and must come under section 5.

Mr. Martin: If it is decided that section 5e is not equitable, then we don't have to consider the question of what other formula is to be used.

Mr. Armstrong: Section 5e is just as much a part of the act as section 5 and is just as binding on state officials as section 5. The Commission in its finding stated that it had ignored section 5e for two reasons (read from his brief)

(Argument)

Mr. Armstrong presented an affidavit by D. A. Robertson for admission into the record.

D. A. ROBERTSON, being first duly sworn by Attorney General Millard, testified as follows:

Mr. Millard: I show you an affidavit which was made and filed by this company and was sworn to by you on December 9, 1953 at Kansas City, Missouri. What do you say as to the statements contained therein?

Mr. Robertson: They are true and accurate of my own knowledge.

BY MR. HOLBROOK:

Q. What is your capacity with the company?

A. I am Controller and Assistant Secretary.

Mr. Armstrong: Practically all of that information is contained in the return as filed.

Mr. Holbrook: Mr. Robertson, you are acquainted where the pipe line comes into Michigan?

A. It comes in at about the east half of the Michigan border.

Q. Below Coldwater?

A. About south of Adrian on the line of Ohio and Michigan.

Q. It originates in the Texas Panhandle Field?

A. Yes.

Q. Where does it terminate?

A. It terminates in Michigan, in Detroit—one of its termini.

Q. As the pipe line comes through the various states, are sales made?

A. Yes.

Q. You don't make sales in Michigan and not in the rest. You do the same in the states it goes through?

A. Yes.

Q. The gas is measured through a station?

A. In case we own the lateral. In other cases, we deliver right off the line to the customer. In Michigan it is measured at the so-called Detroit gate and also at Adrian.

Q. The gas taken from the line near Adrian going to consumers and other points in Michigan, and that severed from the main line at Detroit, never goes outside of Michigan when it is once severed and measured?

A. We do have one sale at the Canadian border.

Q. Is the Windsor line the same severing line as the one you use to sever it in Michigan?

A. It comes up the main line.

Q. But that portion goes to Canada.

A. Yes.

Q. But there is a severance point at the Detroit gate and down here near Adrian where the gas going into Michigan is cut off?

A. Yes, there is some gas coming up.

Q. The gas from Adrian and the Detroit gate, those two outlets or volumes stay right in Michigan?

A. Yes.

Q. And that is why they are severed there. It is in Michigan and it is going to stay in Michigan.

A. It is gas that we brought into Michigan.

Q. When you deliver to Michigan, and it is going to stay in Michigan, it is measured.

A. Yes.

Q. Then your other line goes to Canada?

A. Yes.

Mr. Armstrong: No gas is stored in Michigan by Panhandle?

Mr. Robertson: No, sir.

BY MR. MARTIN:

Q. What do you do with the gas?

A. We sell it to Michigan gas companies and to Michigan Consolidated and to southeastern Michigan.

Q. Do you sell to Consumers?

A. Our sales to Consumers are intrastate sales, at Howell. That gas is produced in the state.

Q. Your sales in Detroit are direct to consumers by Panhandle or to another gas company?

A. It is sold to Michigan Consolidated and delivered at the city gate measuring station.

Q. You claim you don't store at all and therefore your sales to Michigan Consolidated and other companies are all interstate except the sales from the Howell station to Consumers Power.

A. Yes.

Q. Has that been established by court action?

A. It has been accepted by the Federal Power Commission which regulates our rates, based on the cost of delivering the gas.

Mr. Holbrook: There is no objection to the affidavit.

The affidavit of D. A. Robertson was thereupon received in evidence and marked Exhibit 'M'.

BY MR. HOLBROOK:

Q. What percentage of sales of gas are made by the company in Michigan as to total sales made.

A. I believe it is 40%. Our sales to Consolidated alone are 15%.

BY MR. HOLBROOK:

Q. Does the company own the lateral coming off south of Adrian at the main line?

A. Yes, we own all the lateral extending west of the main line.

Q. Where is the cut-off—at the main pipe line or where it connects unto your lateral?

A. I can't answer that.

* * * *

(Argument by Mr. Armstrong)

Certification ommitted

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Affidavit of D. A. Robertson

(Filed April 29, 1954)

AFFIDAVIT

STATE OF MISSOURI)
COUNTY OF JACKSON) SS.

Comes now D. A. Robertson, who, being first duly sworn, deposes and says that he is Controller and Assistant Secretary of Panhandle Eastern Pipe Line Company, a Delaware corporation, hereinafter referred to as "Eastern"; that the following facts are shown by the records of Eastern; that said records are made in the regular course of the business of Eastern and that it is the regular course of the business of Eastern to make such records and that said records are made at the time of the occurrence of the facts involved or within a reasonable time thereafter.

That Eastern is a "natural gas company" within the significance of the federal Natural Gas Act, 15 USCA 717 et seq.

That Eastern's sales of natural gas in Michigan are made wholly in interstate commerce with the exception of those sales of natural gas involving gas which is produced, transported and sold wholly within the State of Michigan, 94.0718 per cent of all sales of natural gas made by Eastern in Michigan being made in interstate commerce and 5.9282 per cent of all sales of gas made by Eastern in Michigan being made in intrastate commerce.

That no part of Eastern's pipe lines in Michigan through which gas is transported and sold in interstate commerce is utilized for the transportation of gas produced in Michigan with the exception of 11.4 miles (reduced to 24" equivalent) comprising the so-called Clawson Lateral, and that 269.76 miles out of the total of 281.16 miles of pipe line in Michigan are exclusively devoted to the interstate transportation and sale of natural gas.

That the "vital statistics" of Eastern's activities within and without Michigan for the calendar year of 1951 or as of the 31st of December 1951, whichever is the more appropriate, including those few statistics hereinabove already stated, may be summarized as follows:

Paid in capital	$ 33,512,500
Surplus	$ 32,785,247
Total paid in capital and surplus	$ 66,297,747
Property in Michigan	$ 7,742,177
Property everywhere	$153,907,876
Percentage of property in Michigan	5.0304%
Payroll in Michigan	$ 253,277
Payroll everywhere	$ 7,557,681
Percentage of payroll in Michigan	3.3512%
Operating expenses in Michigan (including payroll and gas purchases)	$ 537,812
Operating expenses everywhere (including payroll and gas purchases)	$ 26,414,928
Percentage of operating expenses in Michigan	2.0360%

Michigan *intrastate* receipts	$ 1,134,268
Michigan *interstate* receipts	$ 17,999,318
Total Michigan *intrastate* and *interstate* receipts	$ 19,133,586
Receipts everywhere	$ 52,298,971
Percentage of Michigan *intrastate* receipts to total Michigan receipts	5.9282%
Percentage of Michigan *intrastate* receipts to receipts everywhere	2.1688%
Percentage of Michigan *interstate* receipts to total Michigan receipts	94.0718%
Percentage of Michigan *interstate* receipts to receipts everywhere	34.4161%
Percentage of Michigan *intrastate* receipts plus 50% of Michigan *interstate* receipts to receipts everywhere	19.3769%
Pipe line mileage in Michigan (24" equivalent)	281.16 miles
Total pipe line mileage everywhere (24" equivalent)	3,974.55 miles
Mileage of pipe line used exclusively in *interstate* commerce in Michigan	269.76 miles
Mileage of pipe line used in common for *intrastate* and *interstate* commerce in Michigan	11.4 miles

Ratio of pipe line in Michigan used in common *intrastate* and *interstate* sales to total pipe line in Michigan	4.07%
Ratio of all pipe line mileage in Michigan to total pipe line mileage everywhere (24" equivalent)	7.0740%
Traffic units in Michigan (MCF of gas x miles transported in Michigan) in millions	5,736
Total traffic units everywhere (MCF of gas x miles transported everywhere) in millions	210,987
Percentage of traffic units in Michigan	2.71%
Production of natural gas in Michigan	3,047,036 MCF
Production of natural gas everywhere	75,127,501 MCF
Percentage of production in Michigan	4.0558%
Gas purchased in Michigan	0 MCF
Gas purchased everywhere	170,821,381 MCF
Percentage of gas purchased in Michigan	0%
Percentage of gas produced and purchased in Michigan to gas produced and purchased everywhere	1.2389%
1951 Michigan Privilege Fee	$ 7,918.66

That Eastern has timely invoked the provisions of Section 5e of Public Act 183 of 1952 and has heretofore

paid to the Commission the sum of $17,561.89 in connection with its initial report under the Act.

Affiant further states that he is informed and believes and alleges it to be a fact that there is presently operating in Michigan only one other natural gas company which, like Eastern, owns and operates an extensive out-of-state transmission system which is integrated with that portion of its transmission system which lies in Michigan.

Further Affiant saith not.

D. A. Robertson
D. A. Robertson, Controller and Assistant Secretary of Panhandle Eastern Pipe Line Company

Subscribed and sworn to before me, a Notary Public in and for the State and County aforesaid, on this 9th day of December, 1953.

My Commission expires January 27, 1957.

R. B. Scudder
Notary Public

15

(Filed April 29, 1954)

Decision of the appeal board

DETERMINATION OF THE CORPORATION TAX FOR THE YEAR 1952.

Panhandle Eastern Pipeline Company, a Delaware corporation, authorized to do business in Michigan, appealed to this Board for a re-determination of its 1952 corporation privilege fee. The business of the corporation in Michigan is the production, sale and delivery of natural gas. The corporation produces gas in Michigan and sells and delivers gas that is produced in Michigan and gas that is brought into Michigan. It operates pipelines in this State for that purpose.

The corporation submitted its 1952 annual report and remitted an annual privilege fee to the Corporation and Securities Commission in the sum of $17,613.45. The corporation computed this fee under §5e of Act 183, P.A. 1952, upon the following formula:

A — Paid-up Capital and Surplus
B — Ratio of traffic units in Michigan to total traffic units
C — Ratio of production in Michigan to total production
D — Ratio of property value in Michigan to total property value
E — Ratio of operating expenses in Michigan to total operating expenses

F — Ratio of receipts in Michigan to total receipts
X — Annual Franchise Fee

Formula:

$$X = .004 \left(\frac{B + C + D + E + F}{5} \right)$$

Solution:

Let

A = $66,297,747
B = .027100
C = .040558
D = .050304
E = .020360
F = .193769

$$X = .004 \times \$66,297,747 \left(\frac{.027100 + .040558 + .050304 + .020360 + .193769}{5} \right)$$

X = 17,613.45

The Corporation and Securities Commission computed the fee under §5 of Act 183, P.A. 1952, which reads in part as follows:

> "Every co-operative association and every profit corporation organized or doing business under the laws of this state, or having the privilege to do business, employing capital or persons, owning or managing property, or maintaining an office, or engaged in any transaction in this State, etc. etc. shall pay at the time of filing the annual report with the Michigan Corporation and Securities Commission as required by §§81 and 82 of Act 327, P.A. 1931, etc. etc., an annual fee of 4 mills upon each dollar of its paid up capital and surplus, but such franchise fee

shall in no event be less than $10 etc. etc. The term 'surplus' as used in this act shall be taken and deemed to mean the net values of the corporation's propert less its outstanding indebtedness and paid-up capi al etc. etc."

Section 5 of Act 85, P.A. 1921, as amended by Act 183, P.A. 1952, reads in part as follows:

"In the case of computing the annual franchise fee prescribed by §4 of this act, both as to domestic and foreign corporations, such computation shall be made by the Michigan Corporation and Securities Commission, etc. etc. upon the entire paid-up capital and surplus of any corporation which does not maintain a regular place of business outside this State other than a statutory office. With respect to any other corporation, etc. etc., said annual franchise fee shall be determined by the Michigan Corporation and Securities Commission, working in conjunction with the State Department of Revenue, and shall be measured by that proportion of its paid-up capital and surplus which proportion shall be obtained by applying the average of the following three percentages separately computed. • • • "

which percentages in substance are:

"(1) The average value of the taxpayer's real and tangible personal property within the state during the period covered by its report, divided by the average value of all the taxpayer's real and tangible personal property wherever situated during such period. etc., etc.

"(2) The total wages, salaries and other personal service compensation during such period, computed on the cash or accrual basis according to the method used for federal tax purposes, of officers and employees within the state divided by the total wages, salaries and other personal service compensation, similarly computed, during such period of all the taxpayer's officers and employees within and without the State.

"(3) The receipts of the taxpayer, similarly computed, arising during such period etc. etc."

Upon this basis the tax was computed by the Corporation and Securities Commission as follows:

Ratio of property	.050303	
Ratio of compensation	.033512	
Ratio of receipts	.193769	
	3/.277584	
Average ratio	.092528	
Ratio of property	.050303	
Compensation	.033512	
Receipts	.193769	
	3/.277584	
Average Ratio	.092528	
Paid in capital $33,512,500 x .092528 x .004 =		$12,403.38
Surplus 32,785,247 x .092528 x .004 =		12,134.21
Filing fee		2.00
		24,539.59
Remitted		17,561.89
Due State		6,977.70

The corporation in its computation seeks to add two additional factors to the three-factor formula of §5 and to modify the compensation factor. The modification of the compensation factor would be by adding to the compensation factor other operating expense and calling it "operating expense". The two new factors to be added would be production in Michigan to total production, and so-called "traffic units" to total traffic units; production being the number of 1,000 cubic feet of gas produced in Michigan to total 1,000 cubic feet of gas produced in the entire system. "Traffic unit" would be the delivery item of 1,000 cubic feet of gas carried one mile in Michigan against 1,000 cubic feet of gas carried one mile everywhere.

This Board upon reviewing the computation and upon examination of the annual report and upon written and oral argument of counsel is of the opinion that the legislature under §5 has set forth a certain and specific formula and that §5e is intended to apply only in exceptional cases where either the factors set out in the legislative formula do not exist or where the application of the general formula would work an obvious hardship and do an injustice to the taxpayer or the State; that it was not intended to apply where the legislative factors and formulas are reasonably applicable to the Michigan business and activities of the corporation.

There is no evidence presented here that the application of the formula set out in §5 does not reasonably reflect the activities, business, receipts and capital of the corporation attributable to Michigan. The legislative formula in §5 is not a mere suggested formula and §5e should be utilized only in unusual cases where the taxpayer's situation is unique.

It is the experience of this Board that in the application of formulas, any business can present certain factors wherein that business varies and differs from general business practices. This Board is further of the opinion that the suggested factor of "traffic units" are but a delivery item in the transportation of their own commodity in conjunction and coupled with the sale thereof and is properly reflected in the three-factor formula of §5. So also the suggested factor of production in Michigan is properly reflected in receipts. The suggested operating expense is properly reflected in wages and compensation and pipeline equipment in "property in Michigan". It is the opinion of the Board that the suggested factors are but sub-factors already considered and included in the three-factor formula of §5. There is no showing that the legislative formula under §5 of said act does not effect a fair and proper allocation of the receipts, activities and business of the corporation reasonably attributable to Michigan.

For the above reasons it is the opinion of this Board that the computation of the 1952 corporation privilege fee by the Michigan Corporation and Securities Commission is correct and that there is due the State of Michigan by Panhandle Eastern Pipeline Company on the annual privilege fee for the year 1952 the amount of $6,977.70.

Frank G. Millard, Attorney General
D. Hale Brake, State Treasurer
John B. Martin, Auditor General.

DATED: February 19, 1954.

II

Proceedings before the Circuit Court for the County of Ingham

1

Petition for Review under Act 197, PA 1952, as amended

(Filed March 9, 1954)

To the Circuit Court for the County of Ingham:

Now comes Panhandle Eastern Pipe Line Company a Delaware Corporation and respectfully shows as follows.

1. Petitioner is a corporation incorporated under the laws of the State of Delaware and duly admitted to do business in the State of Michigan.

2. Within the time prescribed by law petitioner filed its annual report for the year 1952 as required by Act 327 of the Public Acts of 1931 as amended and paid in full the annual privilege fee, the liability to pay which was disclosed by said report. The amount so paid by petitioner was the sum of $17,561.89 including the filing fee of $2.00. In calculating said annual privilege fee petitioner claimed the benefit of and calculated said fee pursuant to the provisions of Section 5e of Act 85 of the Public Acts of 1921 which was added to said act by Act 183 of the Public Acts of 1952. Petitioner alleges that any calculation of said privilege fee by the allocation factor prescribed by Section 5 of Act 85 of the Public Acts of 1921 as amended does not properly reflect the activity, business receipts and capital of petitioner reasonably attributable to the State of Michigan, and

that said allocation factor set forth in said Section 5 should be adjusted pursuant to the provisions of said Section 5e.

3. The Michigan Corporation and Securities Commission calculated what the annual privilege fee for 1952 of this petitioner pursuant to the allocation factor prescribed in said Section 5 would be, and on August 31, 1953 determined that the total annual privilege fee of this petitioner for 1952 was the sum of $24,539.59 including the filing fee of $2.00, and demanded payment from petitioner of the sum of $6,977.70 which is the excess of said sum of $24,539.59 over the amount paid by petitioner as aforesaid.

4. Petitioner duly appealed, as permitted by Section 9 of Act 85 of the Public Acts of 1921 as amended to the Michigan Corporation Tax Appeal Board consisting of the attorney general, the state treasurer and the auditor general. On February 19, 1954 said Corporation Tax Appeal Board made a determination that the aforesaid computation of the 1952 corporation privilege fee of this petitioner by the Michigan Corporation and Securities Commission was correct and that there was due to the State of Michigan by petitioner on account of its annual privilege fee for the year 1952, the amount of $6,977.70.

5. Said determinations by the Michigan Corporation and Securities Commission and by the Michigan Corporation Appeal Board are contrary to law for the following reasons among others:

(1) The Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board

erred in determining that this petitioner was indebted to the State of Michigan in the amount of $6,977.70.

(2) The Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board erred in determining that Section 5 of Act 85 of the Public Acts of 1921 as amended was applicable in determining the annual privilege fee of petitioner for the year 1952, rather than and without adjustment pursuant to Section 5e of said act as added by Act 183 of the public Acts of 1952.

(3) The Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board acted without statutory authority and in excess of statutory authority in determining that petitioner owed the sum of $6,977.70 to the State of Michigan on account of its annual privilege fee for 1952.

(4) The Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board erred in so determining that petitioner owed the sum of $6,977.70 to the State of Michigan on account of its annual privilege fee for 1952, for the reason that said determination was and is in violation of the rights of petitioner by virtue of and is forbidden by Article I, Section 8 of the Constitution of the United States for the following, among other reasons:

(a) Said determination imposes a direct burden on interstate commerce.

(b) Said determination imposes an unreasonable burden on interstate commerce.

(c) Said determination imposes a direct tax on the privilege of carrying on interstate commerce.

(d) Said determination is based on Section 5 of Act 85 of the Public Acts of 1921 as amended, and said Section 5 in defining the scheme or formula to be used in determining what portion of the paid in capital and surplus of a corporation engaged in interstate commerce is to be used as the basis for its annual privilege fee, fails to make provision for a legal and constitutional method of allocating to the State of Michigan the portion of the receipts of such corporation from interstate commerce which is to be used in determining such basis for such annual privilege fee.

(5) The Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board erred in that said determination was and is in violation of the rights of petitioner under and by virtue of Section I of the Fourteenth Amendment to the Constitution of the United States in that petitioner is deprived of its property without due process of law and is denied due process of law.

(6) The Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board erred in that their said determinations, findings and orders and those of each of them are contrary to law.

6. This petition is filed pursuant to Act 197 of the Public Acts of 1952.

7. Petitioner has paid the Michigan Corporation and Securities Commission under protest and under duress the said amount of $6,977.70.

Wherefore petitioner prays that said determinations, findings and opinions may be reversed and set aside, and that the amount so paid by it under duress and protest to the Michigan Corporation and Securities Commission may be repaid to it together with interest thereon.

PANHANDLE EASTERN PIPE LINE COMPANY

By /s/ D. A. Robertson
Its /s/ Controller - Asst. Sec'y.

Bodman, Longley, Bogle,
Armstrong & Dahling
Attorneys for Petitioner
1400 Buhl Building
Detroit 26, Michigan

STATE OF MISSOURI)
COUNTY OF JACKSON) SS:

/s/ D. A. Robertson being duly sworn, deposes and says that he is Controller - Asst. Secy. of Panhandle Eastern Pipe Line Company, a Delaware corporation, petitioner in the foregoing petition, in whose behalf he signed said petition and that he is duly authorized to sign said petition; that he has read the same and knows the contents thereof and that the same are true except as to matters therein stated to be upon information and belief and as to such matters he believes it to be true.

/s/ D. A. Robertson

Subscribed and sworn to before me
this 6th day of March, A. D. 1954.

/s/ Gene Ungles

Notary Public, Jackson County, Missouri
My commission expires: Feb. 9, 1955.

STATE OF MISSOURI)
COUNTY OF JACKSON) SS:

I, BEN NORDBERG, Clerk of the County Court of Jackson County, the same being a court of record of the aforesaid county, having by law a seal, do hereby certify that Gene Ungles, whose name is subscribed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking said acknowledgment, proof or affidavit a NOTARY PUBLIC duly commissioned and sworn and residing in said county, and was, as such, an officer of said state, duly authorized by the laws thereof to take and certify the same, as well as to take and certify the proof and acknowledgment of deeds and other instruments in writing to be recorded in said state, and that full faith and credit are and ought to be given to his official acts and I further certify that I am well acquainted with his handwriting and verily believe that the signature to the attached instrument is his genuine signature.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of Jackson County Court this 6th day of March, 1954.

/s/ Ben Nordberg
Clerk of the County Court.

2

Certification of record on petition of appellee, by Frank G. Millard

(Filed April 29, 1954)

I, FRANK G. MILLARD, Attorney General of the State of Michigan and as such Chairman of the Corpor-

ation Tax Appeal Board, for the purpose of hearing any appeals from the decision of the Corporation and Securities Commission as to the amount of privilege fee determined by such Commission, do hereby certify that the attached and hereinafter named instruments constitute and are the original and correct record on appeal to said Corporation Tax Appeal Board by Panhandle Eastern Pipe Line Company from determination by the Corporation and Securities Commission determining the privilege fee for said Panhandle Eastern Pipe Line Company for the year 1952.

1. Petition of Appeal, dated the 4th day of September, A.D. 1953, signed by the Panhandle Eastern Pipe Line Company by C. H. N. Burnhan, Vice-President.

2. Amended Petition of Appeal dated the 27th day of November, A.D. 1953, signed by O. W. Morton, one of the Vice-Presidents of Panhandle Eastern Pipe Line Company.

3. Appellant's brief.

4. Appellee's brief.

5. Exhibit "A", being an opinion of the Michigan Corporation and Securities Commission, dated August 28, 1953.

6. Exhibit "B", being the computation of the 1952 privilege fee of the Panhandle Eastern Pipe Line Company, dated August 31, 1953 and signed by the Director of Annual Reports.

7. Exhibit "C", being a photostatic copy of the Michigan Annual Report of 1952 of Panhandle Eastern Pipe Line Company.

8. Exhibit "D", being a letter dated August 28, 1952 from Panhandle Eastern Pipe Line Company to the Michigan Corporation and Securities Commission signed by Mr. D. A. Robertson, Assistant Secretary, forwarding the 1952 Michigan Annual Report.

9. Exhibit "E", being the 1951 Panhandle Eastern Pipe Line Company Annual Report to Stockholders.

10. Exhibit "F", being a letter dated February 12, 1953 from the Michigan Corporation and Securities Commission to Panhandle Eastern Pipe Line Company setting forth the computation of the privilege fee for 1952 signed by the Director of Annual Reports.

11. Exhibit "G", being a letter dated February 24, 1953 from Panhandle Eastern Pipe Line Company to the Michigan Corporation and Securities Commission signed by Mr. D. A. Robertson, Assistant Secretary.

12. Exhibit "H", being a letter dated March 31, 1953 from the Michigan Corporation and Securities Commmission to the Panhandle Eastern Pipe Line Company, signed by Mr. John R. Dykema, Commissioner.

13. Exhibit "I", being a letter dated April 6, 1953 from Panhandle Eastern Pipe Line Company signed by Mr. D. A. Robertson, Assistant Secretary, to Mr. John R. Dykema, Commissioner.

14. Exhibit "J", being a letter dated May 22, 1953 from Panhandle Eastern Pipe Line Company signed by

Mr. D. A. Robertson and addressed to Mr. John R. Dykema, Commissioner.

15. Exhibit "K", being a copy of a chart of distribution of traffic units by States, of Panhandle Eastern Pipe Line Company.

16. Exhibit "L", being a copy of the basis of allocation factors as prepared by Panhandle Eastern Pipe Line Company for the State of Michigan privilege fee in 1952.

17. Exhibit "M", being the affidavit of D. A. Robertson offered and received in evidence at the hearing before the Corporation State Tax Appeal Board on January 28, 1954.

18. System map.

19. Findings and decision of the Corporation Tax Appeal Board signed by Frank G. Millard, Attorney General, D. Hale Brake, State Treasurer, and John B. Martin, Auditor General, dated February 19, 1954.

20. Stenographic Record of proceedings before the Michigan Corporation Tax Appeal Board January 28, 1954.

I further certify that the foregoing constitutes all of the documents filed, pleadings and opinions of the Board or officers and that I have the custody of said originals as above described.

/s/ Frank G. Millard
Attorney General
/s/ by Arthur T. Iverson
Deputy Attorney General

Dated: March 9, 1954.

3

Opinion of the court

(Filed September 13, 1955)

This is an appeal by the Panhandle Eastern Pipeline Company, a Delaware corporation, against Michigan Corporation Tax Appeal Board who affirmed the Michigan Corporation and Securities Commission's assessment of a 1952 privilege tax against plaintiff. The Commission assessed plaintiff's tax under the provisions of § 21.208 Sec. 5 of MSA (Compiled Laws of 1948, § 450.305), whereas, it is the claim of plaintiff that they should be assessed under a new section added by Act 183 of the Public Acts of 1952, being Sec. 5 (e), MSA § 21.208 (5); Compiled Laws of 1948, § 405.305 (e). It is the claim of plaintiff that Sec. 5 does not apply to their situation and that Sec. 5 (e) is a special allocation formula which should be applied to their situation.

Plaintiff claimed the benefits of Sec. 5 (e) and filed their Annual Report for 1952 showing a tax liability of $17,559.89. The Commission claimed that Sec. 5 was applicable to plaintiff's situation and determined the tax due for the year 1952 in an amount of $24,539.59. The determination by the Commission resulted in a tax deficiency of $6,977.70 which was paid by plaintiff under protest on March 5, 1954. The Commission in determining the tax used as a basis for part of such calculation one half of the receipts derived by plaintiff from the sale of natural gas in interstate commerce.

The plaintiff is a pipeline company engaged in the distribution of natural gas. Most of the gas distributed

by plaintiff comes from several of the southern states and is sold in Michigan as well as in other states. A very small portion of the natural gas of plaintiff is produced in Michigan. No gas is purchased by plaintiff within the state of Michigan, so with the exception of the small percentage of gas produced in Michigan, all other gas sold within this state arrives by way of interstate pipe lines. It is the claim of the plaintiff that the defendants were in error in using one half of the total receipts of plaintiff of their interstate business in computing the tax, it being their claim that this is a violation of Art. 1, Sec. 8, of the U. S. Constitution, because it is the placing of a tax on interstate commerce by the State of Michigan.

The tax in question is a privilege tax on the franchise of plaintiff to do business within the State of Michigan, and is not a property tax.

Since this case was decided by the Tax Appeal Board the Supreme Court of Michigan has rendered an opinion involving a similar question in the case of Gartland Steamship Company vs Corporation & Securities Commission, 339 Mich 661. This case was decided on June 7, 1954. In that case the Supreme Court held that the defendant Commission had used the interstate business of the Gartland Company in computing the tax, whereas, they should have calculated the tax in a fair and proper manner according to the receipts, activities, business and capital reasonably attributable to Michigan.

This Court is of the opinion that the decision of the Supreme Court in the Gartland case is controlling in the instant case. Very extensive briefs were filed by the parties herein and a number of Michigan cases as well

as cases from other jurisdictions, which were cited in the briefs, were discussed in the Gartland case.

In the Gartland case the Court stated on page 671:

> "The tonnage Gartland transports intrastate can be definitely separated from the tonnage transported in interstate or foreign commerce, and when that can be done the State should do so in determining the privilege fee.
>
> In Cooney v. Mountain States T. & T. Co., supra, the court said (pp 392, 393):
>
> 'There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. * * * Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business.'

'In Ratterman v. Western Union Telegraph Co., 127 US 411 (8 S Ct 1127, 32 L ed 229), the Court said (pp 424, 425):

> Where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the State to collect that arising upon commerce solely within its own territory.' "

In the instant case this Court is of the opinion that in using the formula set forth in Sec. 5 the defendant is placing a tax on plaintiff based upon the interstate business done by plaintiff. Panhandle does an intrastate as well as an interstate business and the defendant could very readily base the tax upon the intrastate business done by Panhandle. They cannot use the interstate business of plaintiff to increase the amount of this tax. The record also indicates that the Plaintiff could discontinue their intrastate business without withdrawing from the interstate business.

In the case of *D. & C. Navigation Company* vs *Department of Revenue*, 342 Mich 234 on page 243, the Court speaking of the Gartland case stated:

> "While we reversed and ordered a recomputation, we upheld the liability of the company for the tax, if based on a formula reasonably apportioning business done within the State."

Therefore, this Court is of the opinion that the de-

fendant was in error in computing the tax on plaintiff based upon its interstate business and an order may enter directing the Commission to recompute the tax of plaintiff excluding from such computation any and all receipts derived from the interstate transportation and sale of gas outside the state of Michigan.

A public question being involved, no costs will be allowed.

Louis E. Coash
Circuit Judge.

Dated: Sept. 13-1955.

4

Order of the Circuit Court dated October 14, 1955 as corrected by Order of October 25, 1955.

(Filed October 14, 1955)

At a session of said Court held in the City of Lansing, Michigan, this 14th day of Oct. 1955.

PRESENT: HONORABLE LOUIS E. COASH
Circuit Judge

This cause having come on to be heard on the Petition of Panhandle Eastern Pipe Line Company, a Delaware corporation, as petitioner against Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board, consisting of the Attorney General, the Auditor General and the State Treasurer, as defendants, upon the record of the proceedings before said

Commission and before said Board, and this Court after consideration of the same, and after consideration of the arguments of counsel for the respective parties in open court upon said hearing, and after consideration of the briefs filed by said counsel, having filed an opinion in this cause under date of September 13, 1955, determining that said defendants were in error in computing the annual franchise tax of petitioner for the year 1952, and the Court being fully advised in the premises does hereby

ORDER and ADJUDGE that the matter of the computation of the annual franchise tax of petitioner for the year 1952 be remanded to the Michigan Corporation and Securities Commission, and that said tax be recomputed by said Commission pursuant to Section 450.305(e) of the Compiled Laws of 1948 as added by Act 183 of the Public Acts of 1952, and that said Commission exclude from such computation any and all receipts of petitioner derived from the interstate sale in the State of Michigan of natural gas transported by it in interstate commerce through its pipe lines from points outside of the State of Michigan.

A public question being involved, no costs are allowed.

Louis E. Coash
Circuit Judge

Examined, Countersigned and
entered by me
Laura Wahl
Clerk

5

Claim of Appeal

(Filed October 28, 1955)

The corporation and securities commission and Michigan corporation tax appeal board, defendants-appellants in the above entitled cause, claim an appeal from an order determining plaintiff-appellee's annual corporate franchise tax for the year 1952 dated the 14th day of October, 1955, by the Hon. Louis E. Coash, Circuit Judge in and for the county of Ingham.

Defendants-appellants take a general appeal.

Thomas M. Kavanagh
Attorney General
T. Carl Holbrook
Assistant Attorney General
State Capitol
Lansing, Michigan
Attorneys for Defendants-Appellants.

Dated: October 28, 1955.

6

Notice of Appeal

(Filed October 28, 1955)

To: Bodman, Longley, Bogle, Armstrong & Dahling
1400 Buhl Building
Detroit 26, Michigan

Pursuant to Rule 58, Michigan Court Rules, PLEASE TAKE NOTICE that claim of appeal of the Michigan corporation and securities commission and corporation tax appeal board has this day been filed in the above entitled cause from an order entered by the Honorable Louis E. Coash, Circuit Judge in and for the county of Ingham under date of October 14, 1955, wherein it was ordered and adjudged that the matter of the computation of the annual franchise tax of the plaintiff-appellee for the year 1952 be remanded to the defendants-appellants, Michigan corporation and securities commission, and that said tax be recomputed by said commission by excluding from such computation any and all receipts of plaintiff-appellee derived from the interstate sale in the state of Michigan of natural gas transported by it in interstate commerce through its pipe lines from points outside the state of Michigan.

Further, you are hereby notified that on said date defendants-appellants paid the fee required by law for taking this appeal.

Thomas M. Kavanagh
Attorney General

T. Carl Holbrook
Assistant Attorney General

William D. Dexter
Assistant Attorney General
State Capitol
Lansing, Michigan

Dated: October 28, 1955.

7

Order extending the time in which to settle the record on appeal

(Filed November 2, 1955)

At a session of said court, held in the Court House in the City of Lansing, Michigan, on November 2, 1955.

PRESENT: HON. LOUIS E. COASH
Circuit Judge

Upon reading and filing the attached Stipulation,

IT IS ORDERED That the time in which to settle the record on appeal in the above matter be, and it hereby is, extended to and including February 15, 1956.

Louis E. Coash
Circuit Judge

8

Reasons and Grounds for Appeal

(Filed October 28, 1955)

The following constitutes a statement of the reasons and grounds for appeal concerning the matter involved in the above styled court and cause:

1. That the court erred as a matter of law in ordering and adjudging that the matter of the computation of the

franchise tax of plaintiff-appellee for the year 1952 be remanded to the defendant-appellant Michigan corporation and securities commission, requiring said tax to be recomputed by said commission pursuant to discretion given said commission in the statutes made and provided by excluding from such computation "any and all receipts derived from the interstate sale in the state of Michigan of natural gas transported by plaintiff-appellee in interstate commerce through its pipe lines from points outside of the state of Michigan."

2. That the court erred as a matter of law in ordering and requiring in its order of October 14, 1955, a computation of the plaintiff-appellee's corporate franchise fee for the year 1952 on any different basis from that required by section 5 of PA 1952, No. 183, that amends PA 1921, No. 85.

3. That the court erred as a matter of law in determining that it is unconstitutional for the defendants-appellants to compute the plaintiff-appellee's corporate franchise fee for the year 1952 in accordance with the apportionment formula contained in the aforesaid section 5 of PA 1952, No. 183.

4. That the court erred as a matter of law in determining that it is unreasonable for the defendants-appellants to compute the plaintiff-appellee's corporate franchise fee for the year 1952 in accordance with the apportionment formula contained in the aforesaid section 5 of PA 1952, No. 183.

5. That the court erred as a matter of law in determining in its opinion that the defendants-appellants could not constitutionally include in the measure of the

plaintiff-appellee's corporate franchise fee for the year 1952 one-half of the gross receipts derived by plaintiff-appellee from its sales of natural gas from sources without this state to customers located within this state in the sales factor of the apportionment formula contained in the aforesaid section 5 of PA 1952, No. 183.

6. That the court erred as a matter of law in finding and determining that the gross receipts in question that were included in the sales factor of the apportionment formula contained in said section 5 of PA 1952, No. 183, constituted receipts derived from sales in interstate commerce that the defendants-appellants are precluded from including in the measure of the Michigan franchise fee imposed upon a foreign corporation for the privilege of being able to do or doing business within this state.

7. That the court erred as a matter of law in attempting to order the Michigan corporation and securities commission to exercise the discretion given it by section 5 (e) of PA 1952, No. 183.

Thomas M. Kavanagh
Attorney General

T. Carl Holbrook
William D. Dexter
Assistants Attorney General
State Capitol
Lansing, Michigan

Attorneys for Defendants-
Appellants

Dated: October 28, 1955.

9

Stipulation Regarding Settled Record on Appeal

(Filed Nov. 25, 1955)

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled cause by their respective attorneys that the record on appeal shall consist of the items set forth in the appellant's "schedule of contents of settled record on appeal" hereto attached and made a part hereof;

IT IS FURTHER STIPULATED AND AGREED that owing to the size, composition, art and color work involved in the system map and appellee's 1951 report to its stockholders constituting exhibits before the corporation tax appeal board below and the impracticability of reproducing same for the printed record, the originals may be omitted from the printed record and duplicate originals or photostatic copies may be transmitted to the supreme court for use and reference by the court and the parties to this appeal.

Thomas M. Kavanagh
Attorney General

T. Carl Holbrook
William D. Dexter
Assistants Attorney General
State Capitol, Lansing, Michigan

Attorneys for Defendants-
Appellants

Bodman, Longley, Bogle,
Armstrong & Dahling
Attorneys for Plaintiff-Appellee
1400 Buhl Building
Detroit 26, Michigan

Dated: November 8, 1955.

Schedule of Contents of Settled Record on Appeal
List of Calendar & Journal entries in the cause

Proceedings Before the Corporation Tax Appeal Board:

1. Amended petition to appeal board
2. Letter of appellant dated August 28, 1953
3. Decision of the appellant, dated August 31, 1953
4. Panhandle Eastern annual report for 1952 to Michigan Corporation Securities Commission
5. Letter of appellee to appellant, dated August 28, 1952
6. Letter of appellant dated February 12, 1953
7. Letter of appellee dated February 24, 1953
8. Letter of appellant dated March 31, 1953
9. Letter of appellee dated April 6, 1953
10. Letter of appellee dated May 22, 1953

11. Graph of traffic units

12. Detail of allocation factors

13. Testimony at hearing before the appeal board

14. Affidavit of D. A. Robertson

15. Decision of the appeal board

Proceedings Before the Circuit Court:

1. Petition to Ingham County court

2. Certification of Record on petition of appellee, by Frank G. Millard

3. Decision of the court

4. Order dated October 14, 1955, as corrected by Order of October 25, 1955

5. Claim of appeal

6. Notice of appeal

7. Order extending time to settle the record on appeal to February 15, 1956

8. Reasons and grounds for appeal

10

Certificate of the Court

(Filed November 25, 1955)

I, Louis E. Coash, Circuit Judge before whom the above cause was heard, in pursuance of the statute and rules in such case made and provided, do hereby certify that the foregoing record was duly settled by me on this 16th day of November, 1955, within the time extended and allowed by law for such settlement, and that the same, together with the exhibits listed and covered in the Stipulation of Counsel attached hereto, constitute the substance of the testimony and proceedings had in said cause; and that where either questions or answers appear therein, they are deemed necessary to a proper understanding of said cause and of the testimony, and that the foregoing reasons and grounds for appeal were attached to said record at the time of its settlement.

I further certify that, owing to the size, composition, art and color work involved in the system map and appellee's 1951 report to its stockholders (constituting exhibits before the corporation tax appeal board below) and the impracticability of reproducing same for the printed record, pursuant to agreement of counsel the same may be omitted from the printed record and duplicate originals or photostatic copies may be transmitted to the supreme court in lieu of the printing thereof.

Louis E. Coash
Circuit Judge

CALENDAR ENTRIES

Panhandle Eastern Pipe Line Company
Plaintiff,

vs.

Michigan Corporation and Securities Commission, et al.,
Defendants and Appellants.

Bodman, Longley, Bogle,
Armstrong & Dahling
Plaintiff's Attorney

Thomas M. Kavanagh,
Attorney General
T. Carl Holbrook
William D. Dexter
Assistant Attorneys General
Attorneys for Defendants.

An appeal from Ingham in Law

1955	
November 28	Record on Appeal filed.
1956	
January 27	Note of Argument filed.
April 4	Argued in part.
April 5	Concluded and submitted.
June 4	Affirmed with Costs.
June 20	Record returned to Court Below.

JOURNAL ENTRIES

April 4, 1956

Panhandle Eastern Pipe Line Company,

vs. 46693

Michigan Corporation and Securities Commission et al

In this Cause argument was commenced and continued until tomorrow.

April 5, 1956

Argument by Mr. Mickey for Plaintiff and Mr. Dexter for Defendant was concluded and the cause duly submitted.

STATE OF MICHIGAN

SUPREME COURT

APRIL TERM 1956

Panhandle Eastern Pipe Line Company, a Delaware corporation,

Plaintiff and Appellee,

vs.

Michigan Corporation and Securities Commission and Michigan Corporation Tax Appeal Board,

Defendants and Appellants.

Filed June 4, 1956

BEFORE THE ENTIRE BENCH.

SHARPE, J.

This is an appeal by the Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board from an order of the circuit court of Ingham county, Michigan, remanding the cause to the Michigan Corporation and Securities Commission to recompute the annual franchise tax pursuant to § 5e of PA 1952, No 183, being Mason's 1954 Supp § 450.305e [Stat Ann 1955 Cum Supp § 21.208(5)]. Plaintiff, Panhandle

SHARPE, J.

This is an appeal by the Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board from an order of the circuit court of Ingham county, Michigan, remanding the cause to the Michigan Corporation and Securities Commission to recompute the annual franchise tax pursuant to § 5e of PA 1952, No 183, being Mason's 1954 Supp § 450.305e [Stat Ann 1955 Cum Supp § 21.208(5)]. Plaintiff, Panhandle Eastern Pipe Line Company, is a Delaware corporation and is engaged in the distribution of natural gas. Most of the gas distributed comes from Texas and other southern states, however a small portion of the natural gas distributed is produced in Michigan. Defendants, Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board, constitute the administrative agency and quasi-judicial board concerned with the proper determination of corporate franchise privilege fees to be paid the State of Michigan pursuant to PA 1921, No 85, as amended by PA 1952, No. 183 (CL 1948 and Mason's 1954 Supp § 450.301 et seq. [Stat Ann and Stat Ann 1955 Cum Supp § 21.201 et seq.]).

The following statistics of plaintiff's activities for the calendar year of 1951 are material to the solution of the issue presented in this cause: Plaintiff owned and operated in the year in question 3,974.55 miles of pipe line, of which 281.16 miles, or 7.0740%, were located in Michigan. Out of all the miles of pipe line in Michigan, only 11.4 miles, or 4.07%, were used both for gas produced in Michigan and gas produced elsewhere and transported into Michigan. The remaining 269.76 miles of pipe line in this State were used exclusively for the interstate transportation and sale of gas produced in and transported through other states. 5.0304% of plaintiff's property was located in Michigan in the year in question. Of plaintiff's total payroll, 3.3512% is paid in Michigan and 2.0360% of its total operating expenses were incurred in Michigan. For gas

94.0718% of its receipts from sales in Michigan were for gas produced elsewhere and transported in interstate commerce through a pipe line crossing seven other states. The latter sales accounted for 34.4161% of plaintiff's total receipts from all sources, including Michigan.

On August 28, 1952, plaintiff transmitted to defendant commission its annual report for 1952 with a franchise fee for the year 1952 in the amount of $17,561.89, based upon § 5e of PA 1952, No 183 (Mason's 1954 Supp § 450.305e [Stat Ann 1955 Cum Supp § 21.208(5)]. The commission held that plaintiff was not entitled to relief under the provisions of § 5e, but should use § 5 of PA 1921, No 85, as amended by PA 1952, No 183 (CL 1948 and Mason's 1954 Supp § 450.305 [Stat Ann and Stat Ann 1955 Cum Supp § 21.208]). Upon appeal the Michigan Corporation Tax Appeal Board affirmed the ruling of the commission.

Pursuant to PA 1952, No 197, as amended by PA 1953, No 103 (CL 1948 and Mason's 1954 Supp § 24.101 et seq [Stat Ann Rev and Stat Ann 1955 Cum Supp § 3.560(21.1) et seq]), plaintiff filed a petition for review in the circuit court for Ingham county based upon the claim that the action of the appeal board imposed a direct burden on interstate commerce.

On October 14, 1955, an order was entered which, in part, reads as follows:

"ORDER and ADJUDGE that the matter of the computation of the annual franchise tax of petitioner for the year 1952 be remanded to the Michigan Corporation and Securities Commission, and that said tax be recomputed by said Commission pursuant to Section 450.305(e) of the Compiled Laws of 1948 as added by Act 183 of the Public Acts of 1952, and that said Commission exclude from such computation any and all receipts of petitioner derived from the interstate sale in the State of Michigan of natural gas transported by it in interstate commerce through its pipe lines from points outside of the State of Michigan."

Prior to the entry of the above order the trial court filed an opinion, in part, as follows:

"In the instant case this Court is of the opinion that in using the formula set forth in Sec. 5 the defendant is placing a tax on plaintiff based upon the interstate business done by plaintiff. Panhandle does an intrastate as well as an interstate business and the defendant could very readily base the tax upon the intrastate business done by Panhandle. They cannot use the interstate business of plaintiff to increase the amount of this tax. The record also indicates that the Plaintiff could discontinue their intrastate business without withdrawing from the interstate business.

"In the case of D. & C. Navigation Company v. Department of Revenue, 342 Mich 234 on page 243, the Court speaking of the Gartland case (Gartland SS. Co. v. Corp. Comm., 339 Mich 661) stated:

"'While we reversed and ordered a recomputation, we upheld the liability of the company for the tax, if based on a formula reasonably apportioning business done within the State.'

"Therefore, this Court is of the opinion that the [illegible] computing the tax on plaintiff based upon its interstate business and an order may enter directing the Commission to recompute the tax of plaintiff excluding from such computation any and all receipts derived from the interstate transportation and sale of gas outside the state of Michigan."

Defendants appeal and urge:

"That the court erred as a matter of law in determining that it is unreasonable for the defendants-appellants to compute the plaintiff-appellee's corporate franchise fee for the year 1952 in accordance with the apportionment formula contained in the aforesaid section 5 of PA 1952, No. 183.

"That the court erred as a matter of law in determining in its opinion that the defendants-appellants could not constitutionally include in the measure of the plaintiff-appellee's corporate franchise fee for the year 1952 one-half of the gross receipts derived by plaintiff-appellee from its sales of natural gas from sources without this state to customers located within this state in the sales factor of the apportionment formula contained in the aforesaid section 5 of PA 1952, No. 183."

The principal question here for decision is whether the action of the commission and the appeal board violated plaintiff's privilege of carrying on interstate commerce. Citation of authority is unnecessary to establish the rule that our Federal Constitution gives to Congress the sole right and power to regulate interstate commerce, and the States are prohibited from doing that which would substantially or unreasonably burden or obstruct the free flow of such commerce. In the case at bar the trial court found as a fact that 94.0718% of plaintiff's sales of gas in Michigan were sales in interstate commerce through interstate pipe lines.

In Cooney v. Mountain States T. & T. Co., 294 US 384 (55 S Ct 477, 79 L ed 934), cited with approval in Gartland SS. Co. v. Corp. Comm., 339 Mich 661, 671, it was said:

"'There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination.*** Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business.'"

We also cited with approval in the Gartland case, supra, Ratterman v. Western Union Telegraph Co., 127 US 411 (8 S Ct 1127, 32 L ed 229), where the court said:

"'Where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the State to collect that arising upon commerce solely within its own territory.'"

In the case at bar the major part of plaintiff's business is interstate business, completely severable and unrelated to its intrastate business. The record shows that 7.0740% of plaintiff's pipe line mileage is in Michigan; 5.0304% of its property is in Michigan; 3.3512% of its payroll is in Michigan; 2.0360% of its operating expenses are incurred in Michigan; 2.1688% of its receipts are from intrastate sales in Michigan and 5.9282% of its receipts in Michigan are from intrastate sales. It also appears that the commission and the appeal board in determining the tax to be paid included 50% of plaintiff s interstate receipts in the formula provided under § 5 of PA 1952, No 183. In our opinion it is clear that the formula used by the commission includes receipts from a business not related to plaintiff's intrastate business, and under the authority of the Gartland case, supra, it is arbitrary and imposes an unjust burden upon interstate commerce. We hold that the Michigan Corporation and Securities Commission and the Michigan Corporation Tax Appeal Board erred in determining that § 5 of PA 1921, No 84, as amended by PA 1952, No 183, was applicable in determining the annual privilege fee of petitioner for the year 1952, rather than and without adjustment pursuant to § 9c of said act.

The judgment of the circuit court is affirmed, with costs.

Endorsed:
Filed June ., 1956
Hugh W. Carpenter
Clerk, Supreme Court

Signed: Leland W. Carr
Eugene F. Black
Harry F. Kelly
Edward M. Sharpe
John R. Dethmers
Emerson R. Boyles

~~Endorsed:~~
~~Filed June ., 1956~~
~~Hugh W. Carpenter~~
~~Clerk, Supreme Court~~

~~Signed: Leland W. Carr~~
~~Eugene F. Black~~
~~Harry F. Kelly~~
~~Edward M. Sharpe~~
~~John R. Dethmers~~
~~Emerson R. Boyles~~

JUDGMENT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 4th day of June in the year of our Lord one thousand nine hundred and fifty-six.

Panhandle Eastern Pipe Line Company, Plaintiff and Appellee, vs. Michigan Corporation and Securities Commission and Michigan Corporation Tax Appeal Board Defendants and Appellants.	Present the Honorable John R. Dethmers Chief Justice Edward M. Sharpe Talbot Smith Neil E. Reid Emerson R. Boyles Harry F. Kelly Leland W. Carr Eugene F. Black Associate Justices

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Ingham, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Ingham be and the same is hereby in all things affirmed, and that the plaintiff do recover of the defendants its costs, to be taxed, and that it have execution therefor.

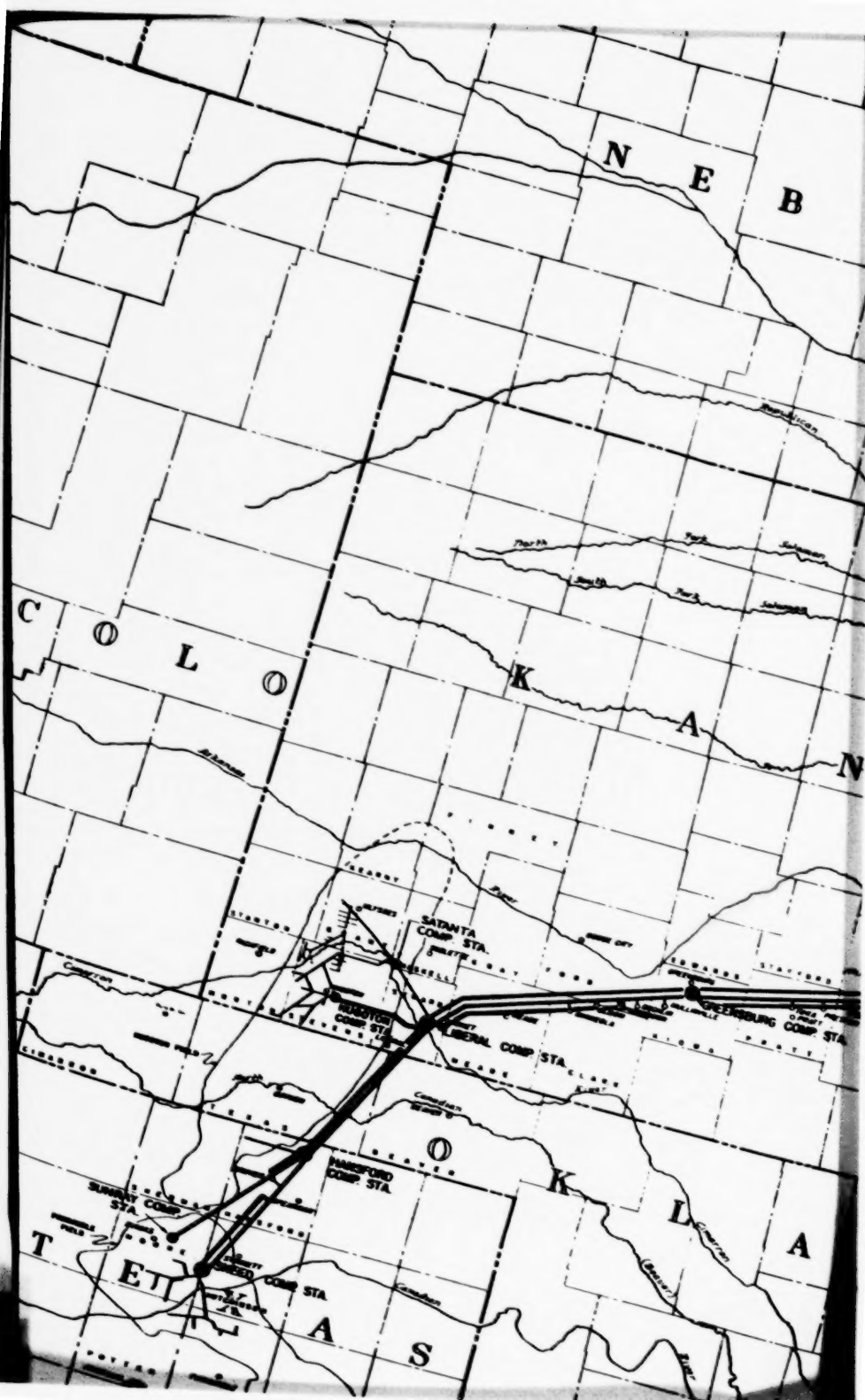
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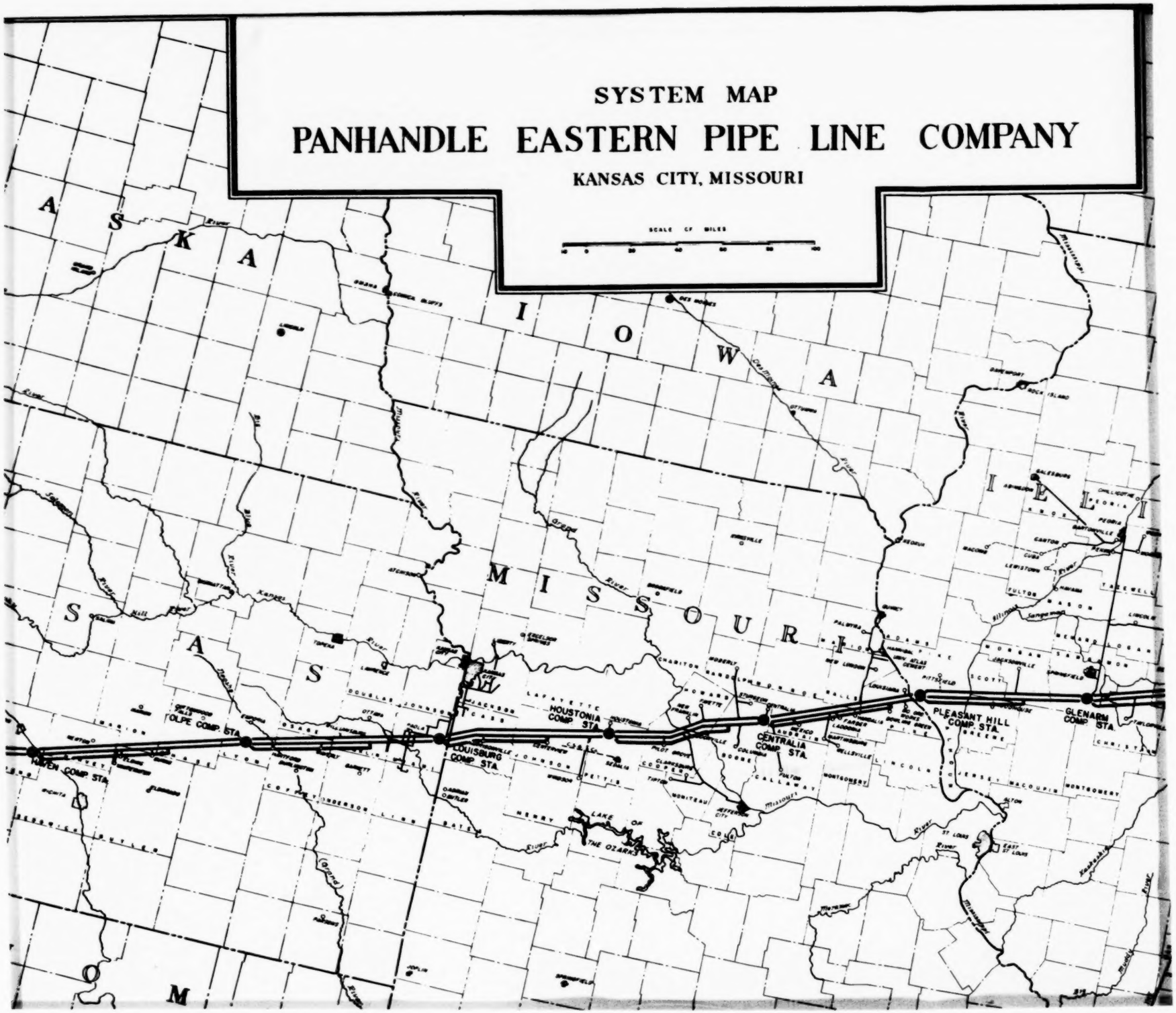
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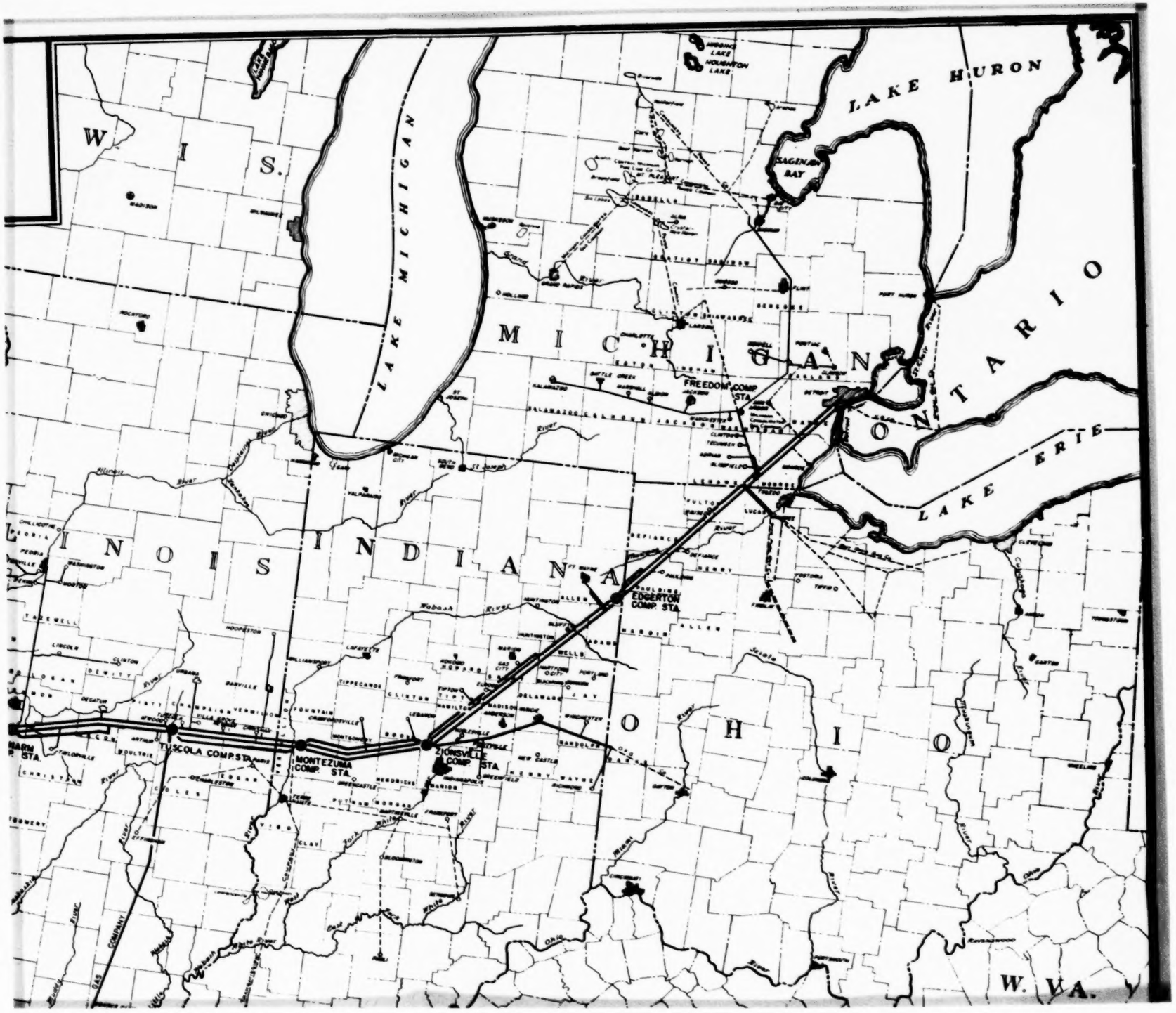
I, Hugh H. Carpenter, Clerk of the Supreme Court of Michigan, do hereby certify that the annexed and aforegoing is a trume copy of the record, and of all proceedings had and deteermined in the above-entitled cause, by said Supreme Courrt; that I have compared the same with the originals and that they are a true transcript thereof and of the whole thereof.

IN TESTIMOONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Supreme Court at the City of Lansing, , this 15th day of August, in the year of our Lord, one thhousand nine hundred and fifty-six.

Hugh H Carpenter
Clerk of the Supreme Court of Michigan.
by D H Winters
Deputy Clerk


NEB
COLO
KANSAS
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SATANTA COMP STA
HUGOTON COMP STA
LIBERAL COMP STA
GREENSBURG COMP STA
HANSFORD COMP STA
SUNRAY STA COMP
BOOKER COMP STA


SYSTEM MAP
PANHANDLE EASTERN PIPE LINE COMPANY
KANSAS CITY, MISSOURI
SCALE OF MILES
KANSAS
IOWA
MISSOURI
ILLINOIS
OLPE COMP. STA.
HOUSTONIA COMP. STA.
LOUISBURG COMP. STA.
CENTRALIA COMP. STA.
PLEASANT HILL COMP. STA.
GLENARM COMP. STA.
LAKE OF THE OZARKS


LAKE HURON
SAGINAW BAY
LAKE MICHIGAN
MICHIGAN
ONTARIO
LAKE ERIE
FREEDOM COMP STA
EDGERTON COMP STA
TUSCOLA COMP STA
MONTEZUMA COMP STA
ZIONSVILLE COMP STA
INDIANA
OHIO
W. VA.

Office - Supreme Court, U.S.
FILED
SEP 27 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 354

MICHIGAN CORPORATION AND SECURITIES COMMISSION AND MICHIGAN CORPORATION TAX APPEAL BOARD, *Petitioners*

v.

PANHANDLE EASTERN PIPE LINE COMPANY, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

PAUL F. MICKEY,
GEORGE B. MICKUM, III
1100 Shoreham Building
Washington 5, D. C.
Attorneys for Respondent

Of Counsel:
STEPTOE & JOHNSON
1100 Shoreham Building
Washington 5, D. C.

H. I. ARMSTRONG, JR.
BODMAN, LONGLEY, ARMSTRONG, BOGLE & DAHLING
1400 Buhl Building
Detroit 26, Michigan

RUSSELL VOERTMAN
PANHANDLE EASTERN PIPE LINE COMPANY
1221 Baltimore Avenue
Kansas City 5, Missouri

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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October Term, 1956

No. 354

MICHIGAN CORPORATION AND SECURITIES COMMISSION AND MICHIGAN CORPORATION TAX APPEAL BOARD, *Petitioners*

v.

PANHANDLE EASTERN PIPE LINE COMPANY, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

OPINIONS BELOW

The opinion of the Supreme Court of the state of Michigan is reported at 346 Mich. 50, 77 N.W.2d 249. The opinion of the Circuit Court for the county of Ingham is unreported and is printed in the Record, page 55.[1] The decision of the Michigan Corporation Tax Appeal Board is also unreported and is printed in the Record, page 40.

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[1] References to the record filed with the petition are indicated as "(R.)."

JURISDICTION

Jurisdiction is adequately alleged in the petition.

QUESTIONS PRESENTED

In the view of the respondent, the questions presented are:

1. Whether in the circumstances of this case the Supreme Court of Michigan correctly required the petitioner to eliminate respondent's gross receipts from interstate commerce from the factors utilized in determining the portion of respondent's capital and surplus upon which a franchise or privilege tax was computed?

2. More specifically, the question is whether, under the Commerce Clause and the Due Process Clause of the United States Constitution, 50% of the receipts from the sale of natural gas transported by the respondent in interstate commerce and delivered to its customers in the state of Michigan can be used with other factors for the purpose of measuring the portion of respondent's capital stock and surplus that is taxable for franchise tax purposes, where the natural gas so transported is delivered directly to wholesale customers without having come to rest and without having been stored or processed in any way in the state of Michigan, and where (a) 7.0740% of respondent's pipeline mileage lies in Michigan, (b) 5.0304% of its property is in Michigan, (c) 3.3512% of its payroll is in Michigan, (d) 2.0360% of its operating expenses are incurred in Michigan, (e) 2.1688% of its receipts are from intrastate sales in Michigan, (f) 5.9282% of its receipts from sales in Michigan are from intrastate sales, and (g) the receipts from in-

terstate sales are not related to or the end result of any intrastate activities of the respondent in Michigan?

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute involved is Public Acts Michigan 1952, No. 183, Sections 4, 5, and 5e, Mich. Stat. Ann., 1953 Cum. Supp. §§21.205, 21.208, which have been printed in "Appendix 'C'" to the petition (App. 8a-14a).[2] The relevant provisions of the United States Constitution are Art. I, §8, and the Amend. XIV, §1. These provisions are likewise printed in "Appendix 'C'" to the petition (App. 14a).

The statute, §4 (App. 8a), imposes an annual franchise tax for the privilege of doing business in Michigan. Under § 5 (App. 10a) of the statute, a formula is provided to determine what percentage of a corporation's capital and surplus is attributable to the state of Michigan. The formula is comprised of three factors, separately determined and then averaged. These factors are: (1) the ratio of Michigan property to total property everywhere; (2) the ratio of Michigan payrolls to total payrolls everywhere; and (3) the ratio of Michigan receipts to total receipts. Michigan receipts are defined to include (a) the total receipts from intrastate sales plus (b) 50% of the receipts derived from sales in Michigan of goods transported into the state plus (c) 50% of the receipts from sales made out of the state of the property shipped from Michigan.

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[2] References to the appendix to the petition for a writ of certiorari herein are indicated as "(App.)"

The statute further provides in §5e (App. 13a) that if an application of the allocation factor determined under the §5 formula "* * * *does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state, the commission shall adjust"[3] the result by, among other things, "*excluding* 1 or more of the factors" used in the formula or "*including* 1 or more other factors" or applying "any other similar method calculated to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to this state."

COUNTERSTATEMENT OF THE CASE

At all times throughout this proceeding, respondent has acknowledged liability to the state of Michigan for a franchise tax. It has contended only that one part of the three-part apportionment formula provided by §5 was inappropriate as applied to respondent's business and that this part of the formula should be adjusted under §5e, or, in the alternative, excluded from the measure of the tax. The court below has not held that respondent is not subject to the franchise tax, but merely agreed with respondent that the state taxing authorities, petitioners here, should apply §5e in the particular circumstances of this case.

Respondent invoked §5e by its original filing with the Commission for the year 1952 and in its appeal to the Appeal Board (R. 1-7, 8-27). In filing its franchise tax return with the state of Michigan, it maintained that strict adherence to §5 was inappropriate and computed the tax by a different formula under

[3] Unless otherwise indicated, emphasis has been added throughout.

§5e. It included in its computations additional factors, including pipeline mileage or traffic units and operating expenses (*ibid*). Subsequently, it made several other proposals as to how the fee might be computed, taking the position that the use of the §5 formula did not properly reflect the portion of the capital and surplus allocable to the state (R. 14, 18, *et seq.*).

The petitioners, the Commission and the Appeal Board, refused to apply §5e and insisted upon strict adherence to the formula prescribed by §5 in the calculation of respondent's franchise fee. Respondent appealed, and both courts below, the Circuit Court for the county of Ingham and the Supreme Court of Michigan, held that petitioners were required, with respect to the gross receipts factor, to make an adjustment under §5e by excluding interstate receipts rather than rigidly applying §5. Thus, the Michigan Supreme Court stated (App. 7a-8a):

> "In our opinion it is clear that the formula used by the commission includes receipts from a business not related to [respondent's] intrastate business * * *. We hold that the * * * [petitioners] erred in determining that §5 * * * was applicable in determining the annual privilege fee of [respondent] for the year 1952, rather than and without adjustment pursuant to §5e of said act."

In the courts below, respondent urged that the use of the §5 formula, as opposed to other possible formulae pursuant to the provisions of §5e, contravened the Commerce Clause and Due Process Clause [4] of the United

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[4] The petition (5) suggests that only the Commerce Clause was involved. However, in the Appendix to the petition, petitioners also quote the Due Process Clause of the Fourteenth Amendment (App. 14) as being involved. No specific argument on this point is

States Constitution. The Michigan Supreme Court held (App. 7a) that the use of the §5 formula

> "* * * is arbitrary and imposes an unjust burden upon interstate commerce."

Respondent will not argue (although the matter might be debated) that the decision below was not based upon the Federal Constitution. The court below held that none of respondent's interstate receipts could be used as a measure of its intrastate activity in the state; and it appears to have done so upon the ground that the action of petitioners was prohibited by the decisions of this Court construing the Federal Constitution.

The petitioners take the general position that:

> "* * * the State is not prohibited by the Commerce Clause from including receipts or property derived from or used in interstate commerce in the factors used to measure * * * the reasonable value of the privilege granted Panhandle, *permission to do and doing an intrastate business within the State*" (Pet. 14).

Respondent has no quarrel with this statement as a general proposition, where interstate receipts are related to or are a reasonable measure of an intrastate activity; but, it is the *intrastate privilege only* which is to be measured. Neither here nor below has there been any attempt to show that the inclusion of interstate receipts in the formula prescribed by §5 of the

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required. Respondent reserves the right to argue that the Due Process Clause prohibits the use of the §5 formula if a writ of certiorari is granted. See, for example, *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell*, 283 U.S. 123, 132-3.

Michigan statute measures the reasonable value of respondent's privilege of doing an *intrastate* business.

Whether, and the extent to which, gross receipts from interstate commerce may be used as a measure of an intrastate privilege must depend upon the facts of each case. In this case the Michigan courts have held that the use of the receipts factor contained in §5 was arbitrary under the facts presented and constituted an undue burden on respondent's interstate activities. Petitioners have made no attempt to set out the facts regarding respondent's activities upon which the court below concluded that the allocation formula, as applied, was unconstitutional. These facts demonstrate that the Michigan courts had a reasonable and compelling basis for holding that the use of the §5 formula did not properly measure respondent's intrastate activities. We review the facts briefly.

Respondent, a Delaware corporation, is a natural gas company subject to the provisions of the Natural Gas Act, 15 U.S.C. §717 *et seq.*, engaged in the business of transporting and selling natural gas in interstate commerce (R. 35). As such, it transports and sells natural gas by means of a pipeline extending from Texas through Oklahoma, Kansas, Missouri, Illinois, Indiana, Ohio, and Michigan (see map at last page of record). In the first three of these states, it produces and purchases large volumes of natural gas for interstate transmission and sale through and in various states. In 1952, the year in question, respondent also produced a very small quantity of gas in the state of Michigan. No gas was purchased in Michigan, and all of that produced there was sold in Michigan (R. 35, 38).

Altogether, respondent owned and operated 3,974.55 miles of pipeline in 1952, of which 281.16 miles or 7.0740% were located in Michigan (R. 37, 38). Out of all the miles of pipeline in Michigan, 11.4 miles or 4.07% were used both for gas produced in Michigan and gas produced and purchased elsewhere and transported into Michigan (R. 37-8). The remaining 269.76 miles of pipeline in Michigan (R. 37) were used exclusively for the interstate transportation and sale of gas produced in and transported through other states (R. 36). 5.0304% of respondent's property was located in Michigan in the year in question (R. 36).

Of respondent's total payroll, 3.3512% was paid in Michigan, and 2.0360% of its total operating expenses were incurred in Michigan (R. 36). For gas produced and sold in Michigan, respondent received 2.1688% of its total receipts everywhere (R. 37). 94.0718% of its receipts from sales in Michigan were from gas produced or purchased elsewhere and transported in interstate commerce through a pipeline crossing seven other states. These latter sales accounted for 34.4161% of respondent's total receipts from all sources including Michigan (R. 37).

With the exception of the gas produced in Michigan, which is clearly sold in intrastate commerce, all of the gas sold by respondent in the state moves in a continuous uninterrupted stream from the fields in the southwest, through as many as seven other states, to the point of delivery. There is no pause, no transfer, no storage of gas in Michigan (R. 33). The gas produced in Michigan is sold in Michigan to one customer, Consumers Power Company (R. 33).

The sale of the gas produced in Michigan is in no way dependent upon the interstate business; and the

interstate sale of gas is not related in any way to the intrastate sale. The Circuit Court found that respondent "* * * could discontinue [its] intrastate business without withdrawing from the interstate business" (App. 5a, R. 58). The court below found that 94.0718% of respondent's sales of gas in Michigan were sales in interstate commerce through interstate pipelines (App. 6a). It also indicated that respondent's intrastate business in Michigan is insignificant in comparison with its purely interstate business (App. 7a). Moreover, the court found that respondent's sales and facilities used in its intrastate business were readily ascertainable and in no way related to the interstate business. It said (App. 7a):

> "In the case at bar the major part of [respondent's] business is interstate business, completely severable and unrelated to its intrastate business. * * * In our opinion it is clear that the formula used by the commission includes receipts from a business not related to [respondent's] intrastate business * * *."

Petitioners, notwithstanding the uncontroverted facts and without even challenging the facts or the courts' findings of fact, appear to take the position that the sales made by respondent in Michigan of gas piped through many other states are in fact intrastate sales or involve substantial intrastate activity (Pet. 7-9). They state, for example, that the gas sold in Michigan is "severed" from the main line and that many lateral lines run "wholly intrastate." This is contrary to the fact and the conclusion of fact by both Michigan courts. These exact claims were advanced there and found no support. The gas is transported from Texas in a continuous uninterrupted flow to the point of sale in Michigan (see map at last page of

record). There is no pause, no transfer, no interruption, no storage of gas in Michigan (R. 33).[5]

There is no warrant for an attempted distinction between main lines and laterals, nor is there any basis for asserting that laterals run wholly intrastate, severed from the main line. A lateral is simply a somewhat smaller pipe used as a branch or continuation of a main line because it would be uneconomical to use larger pipes to carry smaller quantities of gas. Some of the gas brought into Michigan by respondent is sold from large or main lines to distributors who are directly adjacent to that line; but, because the volumes to be carried decrease as deliveries are made, the large line is reduced in size at various points, or, because the distributing companies purchasing the gas are located in scattered areas away from the main line, laterals are used to deliver gas to them. The gas moves without pause or storage directly from the main lines into the laterals and thence to the customers. This Court has specifically passed upon the transportation and sale of natural gas through laterals and determined that such transportation and sale was interstate commerce. *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Com.*, 332 U.S. 507, 512-13; *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.*, 314 U.S. 498, 503-4.

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[5] Some questions asked by petitioners' counsel during the hearing before the Commission used the terms "severance" and "severed," but it is not clear just what is meant. Respondent's witness did not in any manner so testify (R. 32-3).

ARGUMENT

As in the court below, the petitioners ask this Court to consider two equally unsupportable arguments, which are fused and not defined, but basic to the petition.

The first is that respondent's deliveries and sales in Michigan of gas transported from other states were really intrastate, not interstate. Petitioners refer to respondent's "theory" (Pet. 9) that such sales were interstate sales and ask this Court to consider that "many lateral lines run *wholly intrastate*, severed from the main pipelines coming up from Texas." As we have shown above, this question of fact has been properly determined by the courts below, and in a manner consistent with this Court's decisions on the precise point in *Panhandle Eastern Pipe Line Co.* v. *Pub. Serv. Com.* and *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.*, both *supra*. It is also in accord with the decision in *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 307, that

> "Transportation of gas from one state to another is interstate commerce; and the sale and delivery of it to the local distributing companies is a part of such commerce."[6]

There is consequently no substantial basis for requesting a review of this question as determined below.[7]

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[6] See also *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U.S. 422; *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U.S. 90.

[7] Petitioner cites *Panhandle Eastern Pipe Line Co.* v. *Michigan Pub. Serv. Com.*, 341 U.S. 329 (Pet. 17) for the proposition that respondent's interstate sales are "local in aspect." That case is not germane in any respect, the question being whether the Mich-

The second argument is that the Commerce Clause does not prohibit the state of Michigan from including interstate receipts in measuring the value of the privilege of doing intrastate business (Pet. 14). If petitioners were correct in their position that the sales and deliveries in question were not interstate sales, but were intrastate because made through laterals, or if these sales were dependent upon or inseparable from respondent's small intrastate business, a different question would be presented. But, on the record and the opinion of the court below, the intrastate business privilege to respondent by Michigan is only 6% of its total sales in Michigan, involves only 4% of its pipelines in Michigan, and is so unrelated to its interstate business that it not only is separable, but it could be discontinued without affecting the interstate business (App. 5a). Consequently, the question presented to the court below was whether the small, severable local activity would justify the arbitrary inclusion of 50% of receipts from interstate sales in the measure of the tax, *in addition* to receipts from the local business.

That court's decision of the question is in accord with the decisions of this Court. The law with respect to a state franchise or privilege tax upon interstate commerce has been clear for many years. A state may not tax the privilege of engaging in interstate commerce, and when a corporation engages in both interstate and intrastate commerce, the state may not enhance its tax upon the intrastate commerce by refer-

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igan Public Service Commission had regulatory jurisdiction over a certain kind of sale of natural gas. While the Court held that the Commission did have jurisdiction, it also held that the sale involved "* * * is clearly interstate commerce" (341 U.S. at 333).

ence to interstate commerce which is separable from and independent of the intrastate commerce.[8] The entire local business of respondent is sufficiently unrelated to its interstate business that Michigan may tax it freely. But the sale of gas brought in from other states is an integral part of interstate commerce and not subject to the privilege fee exaction, directly or indirectly. In the circumstances of this case, including gross receipts from purely interstate sales in the allocation formula would require respondent to pay for the privilege of engaging in the interstate transportation and sale of natural gas.

In *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U.S. 465, 470, the Court had before it an excise or franchise tax upon the privilege of carrying on the sale of natural gas in Ohio. The Court said, on the general proposition of privilege taxes:

> "* * * *It is elementary that a state can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom.* * * * And, while a state may require payment of an occupation tax by one engaged in both intra-

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[8] *Railway Express Agency, Inc.* v. *Virginia*, 347 U.S. 359; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, infra; Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602; *Gwin, White & Prince* v. *Henneford*, 305 U.S. 434, 438-9, "* * * state taxation, whatever its form, is precluded if it * * * undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state." See *Leloup* v. *Port of Mobile*, 127 U.S. 640; *Crutcher* v. *Kentucky*, 141 U.S. 47; *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U.S. 203; *Cudahy Packing Co.* v. *Hinkle*, 278 U.S. 460; *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U.S. 218; *Cooney* v. *Mountain States Tel. & Tel. Co., infra; Fisher's Blend Station* v. *State Tax Commission*, 297 U.S. 650; *Sprout* v. *South Bend*, 277 U.S. 163.

> state and interstate commerce, *the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business.*"

This same doctrine was applied in *Cooney* v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384, which was relied upon by the court below; and the test laid down was applied, point by point, to the facts of this case.

East Ohio was a public utility furnishing natural gas locally in more than fifty municipalities in the state. As a part of its business, East Ohio transported gas into Ohio from West Virginia and Pennsylvania. The Court described with great particularity the business conducted by East Ohio Gas Company in Ohio. It pointed out (283 U.S. 470-71) that the interstate transportation and sale of gas from wells outside of Ohio to the connection with local distributing systems was "essentially national—not local—in character and is interstate commerce within as well as without that state." However, while the transportation of some gas was interstate commerce, the company also was engaged, in a very substantial way, in furnishing gas to consumers at retail by means of local distribution plants which it operated. Therefore the Court said that the distribution and sale of "relatively tiny streams" of gas to the ultimate consumer through small, house-to-house supply mains by the East Ohio company was an intrastate

business of purely local concern for which the state could exact a privilege fee.[9]

The tax involved here does not meet the tests laid down by the Court in the *East Ohio* case. Since respondent is not a retailer engaged in local distribution as was East Ohio Gas Company, and since its intrastate business is severable from the interstate business and minor in character, there is no substantial local activity to form a basis for including gross receipts from interstate sales in the measure of the privilege.

Notwithstanding the three-factor formula used, the tax here in question varies directly according to the size of the interstate receipts factor. Thus, the record shows that the inclusion of one-half of the gross receipts from interstate sales in Michigan raises the gross receipts factor from 2.1688% (percentage of Michigan intrastate receipts to receipts everywhere) to 19.3769% (percentage of Michigan intrastate receipts plus 50% of receipts from interstate sales made in Michigan to total receipts) (R. 37). This in turn more than doubles the tax, raising it from $9,326.64[10] to $24,539.59 (R. 13). Thus, because of the use of receipts derived from interstate sales, the tax is not

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[9] Respondent here does not engage in any comparable activity. It sells at wholesale, in large volumes, and in interstate commerce. See *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.* and *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, *supra*.

[10] This figure does not appear in the record, but is apparent from other facts in the record. The record shows that the property percentage is 5.0304% and the payroll percentage is 3.3512%; and when these are averaged with 2.1688%, the result is 3.5168%. When this percentage is applied to total capital and surplus and multiplied by 4 mills, the result is the figure used.

"imposed solely on account of the intrastate business without enhancement because of the interstate business done." By the same token, under the statute, the tax apparently could not be avoided by respondent if it discontinued the small intrastate business it does. It could withdraw from the intrastate business without discontinuing its interstate business, as the courts below found (App. 5a, R. 58), but the tax would still be imposed. This fact makes it clear that as applied to respondent, the tax is on the "privilege" of engaging in its interstate business.

The principles stated in the *East Ohio* case as determining the validity of a franchise or privilege tax as it is related to doing business in interstate commerce were reaffirmed in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 168, in which this Court held that the Texas tax on the privilege of gathering gas was unconstitutional because the incidence of the tax was upon "interstate commerce itself." As applied, the tax was upon the taking of gas into the interstate pipeline from gatherers—the loading of the line.[11] The Court said (347 U.S. 170):

> "Here it is perhaps sufficient that the privilege taxed, namely the taking of the gas, is not so separate and distinct from interstate transportation as to support the tax. But additional objection is present if the tax be upheld. It would

[11] There is no difference between the loading and the unloading. See the *Barrett* case, *supra*. Cases upholding franchise taxes on activities related to interstate commerce where the taxpayer does both an intrastate and an interstate business are cited by the petitioner. However, as this Court said in the *Calvert* case, citing a number of these authorities, "* * * these cases are distinguishable * * * in that in each of them the tax was imposed on a less integral part of the commerce process involved" (347 U.S. at 169, N. 7). "The separation must be realistic" (*ibid* in text).

> 'permit a multiple burden upon that commerce' * * * for *if Texas may impose this 'first taking' tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or 'unloading' from the pipeline of the same gas when it arrives for distribution.* Oklahoma might then seek to tax the first taking of the gas as it crossed into that State. The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate. 'The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.' "

Petitioners have not only completely ignored the rules stated in the cases previously cited, but also the principle, mentioned in the *Calvert* case, that an allocation formula which permits multiple taxation of interstate commerce is invalid. The other states through which respondent's lines run are not bound to use any particular formula. If Michigan may utilize 50% of respondent's gross receipts from interstate business in an allocation formula, on the basis of the sale and delivery of gas in Michigan, the state of Texas should be entitled to use 50% or 100% of respondent's receipts on the basis of the production and gathering of the same gas in Texas as a measure of the privilege of doing business in Texas. In addition, Kansas, Oklahoma, Indiana, Illinois, Missouri, and Ohio, because of local activities, might also tax respondent under a conventional method of apportionment, on the basis of the miles of pipe in each state or upon the volumes of gas transported or upon the gross receipts derived from the volumes of gas transported through each.

The gas which is sold is purchased or produced, gathered, and transported through other states at great cost before being sold in Michigan. Only 7% of respondent's pipeline lies in the state of Michigan, and there is no foundation for thinking that the uninterrupted transportation of the gas for the last 7% of its interstate journey warrants the exaction of a tax based on 50% of the gross receipts from such transportation, purchase, and production.

Petitioners apparently assume that because the termination of respondent's interstate business takes place in Michigan, the state has the right to levy a tax based upon that part of the interstate activity which occurs in Michigan. But this is clearly not the case, especially where the tax imposed is a condition to doing the interstate business within the state. This has been the law for many, many years. See *Leloup* v. *Port of Mobile*, 127 U.S. 640. As this Court said in *Railway Express Agency, Inc.* v. *Virginia*, 347 U.S. 359, 367-8:

> "Here the State exacts every receipt from the movement of express in interstate commerce. It makes a portion of gross revenue from 'all receipts earned in this State on business passing through, into or out of this State.' It contends that this obvious burden on interstate commerce is validated by state protection of a localized incident in the course of the business. The three incidents are originating the interstate movement, which requires local pickup of the parcels; terminating the movement, which requires delivery, and movement through the State. If each of these incidents is sufficient warrant for taxing gross revenues from wholly interstate commerce, a concern doing a nation-wide business is vulnerable to a gross revenue tax in every one of the

> forty-eight states. But it is argued that this is permissible, provided the states formulate their burden so as each to burden it proportionately, not encroaching on the other's right to burden. *It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax.*"

In their discussion of several authorities, petitioners state that respondent's authorities "fall somewhat short of laying the precise question at complete rest" (Pet. 14) and that the decision below was "probably not in accord" with a number of other decisions of this Court (Pet. 16).[12] These decisions are cited without any distinction between the imposition of a franchise or other privilege tax on the business of transporting commodities in interstate commerce and a similar imposition upon a more localized business. Virtually all of them involved taxes upon corporations which engaged in a substantial intrastate or local activity such as manufacturing or selling, and it was the privilege of engaging in this local activity that was taxed.[13] The receipts from interstate commerce

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[12] Petitioners (Pet. 16, N. 15) do not claim that these cases control "singly or in the aggregate." No attempt is made to explain how the decision below conflicts with any or all of these cases; and in fact no such explanation could be offered.

[13] *Baltic Mining Company; Underwood Typewriter; Hump Hairpin; International Shoe; Western Cartridge; Ford Motor Company; Wood Preserving; Western Livestock;* and *International Harvester* all involved manufacturing or similar localized activities on which the taxes in question were levied. Where interstate receipts were used in determining the tax, they were the end product

involved, and which were apportioned for tax purposes, were the end product of a purely intrastate manufacturing or related activity and arose from the shipment of merchandise manufactured, produced, or acquired within the taxing state to points outside the taxing state or sales by a separate sales organization of the taxpayer.

International Harvester Co. v. *Evatt*, 329 U.S. 416, illustrates well the nature of all of the cases cited. There this Court had before it an excise or franchise tax upon the privilege of carrying on business within the state. International owned and operated two large factories in Ohio and four branch selling establishments associated with four warehouses and fourteen retail stores, all located in Ohio. The tax was prescribed on the basis of a complicated formula, which included, among other things, proceeds from the sale of goods manufactured outside of the state but sold in Ohio by Ohio branches of the taxpayer to customers in Ohio. As to these sales, this Court said, 329 U.S. at 421,

> "The Ohio sales agencies' business and their sales to Ohio customers were *intrastate activities.*"

Also, this case involved the imposition of the franchise tax upon the manufacturing business done in Ohio. This Court said that the tax was

> "* * * assessed only against the privilege of doing local Ohio business of manufacturing and

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of a purely intrastate or local activity. *Butler Bros.* v. *McColgan*, 315 U.S. 501, cited in the petition, does not involve the Commerce Clause. *Matson Navigation Co.* v. *State Board of Equalization*, 297 U.S. 441, is also not germane. *East Ohio Gas Co.* v. *Tax Commission of Ohio, supra*, clearly supports the decision below.

> selling * * * the privilege of operating factories and sales agencies in Ohio" (329 U.S. at 423). "The fact that it [the state] chose to measure the amount of such a tax by the value of the goods the factory has produced * * * does not transform the tax on manufacturers to something else" (329 U.S. at 420).

It is submitted that the decision below is not in conflict with any applicable decisions of this Court. It is simply a valid and logical application to the facts of this case of well-established principles.

Although no new or substantial question is presented, petitioners ask review on the ground that the decision below seriously impairs the Michigan revenue. They imply, almost, that it wrecks the entire Michigan tax structure and may adversely affect other states (Pet. 17, *et seq.*, App. D).

Petitioners' statements as to the effect of the decision on the state's tax structure are made without any effort to relate the claimed effect to the facts and the specific holding of the Supreme Court of Michigan. The unsupported assertions as to the loss of revenue to the state of Michigan (Pet. 17 *et seq.*) are apparently predicated upon the assumptions (1) that as a result of the decision below, the §5 formula prescribed in the statute involved is "legally dead" (Pet. 13) as to all taxpayers, and (2) that no reasonable assessments could be made under §5e, as provided for by the Michigan legislature and directed by the court below. There is no basis for any such assumptions.

In the first place, the facts underlying the decision below would furnish little or no precedent for other

taxpayers. Each taxpayer is required to demonstrate the inapplicability of the §5 formula to it. *Norton Co.* v. *Dept. of Revenue*, 340 U.S. 534. The facts as to respondent's business in Michigan are clearly inapplicable to most businesses. Only one other natural gas pipeline served Michigan in 1952 (R. 39). A showing such as that made by this respondent, particularly with respect to the fact that its interstate receipts were not connected with any intrastate or local activity, might be very difficult in most instances. Petitioners should not be accorded a review by this Court of a decision involving sound application of settled legal principles on the ground of unsupported and highly questionable estimates of unknown persons that substantial losses of revenue might result.

The assertion (Pet. 19) that the decision below "might tend to weaken" the tax structures of other states having corporate franchise taxes that employ apportionment formulae has even less support. In Appendix D, petitioners cite a number of state statutes. A similar list of citations was included in the brief before the court below. As we said there, it seems clear, without argument, that these citations could have no significance unless accompanied by an adequate showing as to how the statutes are applied by the taxing authorities of those states, how they are construed by the respective state courts, whether they have ever been challenged under the Commerce Clause of the United States Constitution, and, if so, the facts involved and the decisions reached.

CONCLUSION

WHEREFORE, respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL F. MICKEY,
GEORGE B. MICKUM, III
1100 Shoreham Building
Washington 5, D. C.
Attorneys for Respondent

Of Counsel:

STEPTOE & JOHNSON
1100 Shoreham Building
Washington 5, D. C.

H. I. ARMSTRONG, JR.
BODMAN, LONGLEY, ARMSTRONG,
BOGLE & DAHLING
1400 Buhl Building
Detroit 26, Michigan

RUSSELL VOERTMAN
PANHANDLE EASTERN PIPE LINE COMPANY
1221 Baltimore Avenue
Kansas City 5, Missouri